Supreme Court, U.S.
FILED
DEC 9 1991
OFFICE OF THE CLERK

91-934

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS E. LADNER,
Petitioner

v.

J. B. SMITH, ET AL,
Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MARCH H. COFFIELD
SEALE, STOVER, COFFIELD
& BISBEY
P. O. Box 480
Jasper, Texas 75951
(409) 384-3466

Counsel for Petitioner,
Thomas E. Ladner

Alpha Law Brief Co. — 6113 Aletha Lane — Houston, Texas 77081 — 981-9000

QUESTIONS PRESENTED FOR REVIEW

(1) Whether Petitioner was placed in double jeopardy by being tried twice for exactly the same conduct, as proscribed by the law of *Grady v. Corbin*.

(2) Whether the transcript of the second trial should be considered in determining whether or not the State proved the identical conduct to prove murder as it did to prove the civil rights offense.

PARTIES TO THIS PROCEEDING

The names of the parties to this prooceeding are as follows:

1. Thomas E. Ladner
   P. O. Box 111
   Hemphill, Texas 75948
   (Petitioner)
2. J. B. Smith, Sheriff
   Smith County Courthouse
   Tyler, Texas 75702
   (Respondent)
3. Jim Mattox, Attorney General of Texas
   P. O. Box 12548, Capitol Section
   Austin, Texas 78711
   (Respondent)
4. Joe Tunnell, District Judge
   241st District Court
   Smith County Courthouse
   Tyler, Texas 75702
   (Respondent)
5. Bill Horton
   Hemphill, Texas 75948
   (Intervenor)
6. James Hyden
   Hemphill, Texas 75948
   (Intervenor)
7. John H. Seale and March H. Coffield
   P. O. Box 480
   Jasper, Texas 75951
   (Attorneys for Petitioner)
8. Jack Skeen, Jr.
   District Attorney
   403 Smith County Courthouse
   Tyler, Texas 75702

9. Kenneth D. Nash, Michael J. Sandlin, and
Frank W. Henderson
Assistant District Attorneys
403 Smith County Courthouse
Tyler, Texas 75702

10. C. Rex Hall, Jr.
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(Attorney for Respondents)

11. Charles Palmer
Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(Attoorneys for Respondents)

12. Jeff Haas
908 First Place
Tyler, Texas 75702
(Attorney for Intervenor Bill Horton)

13. Paul Buchanan

1640 N. Major Drive, #201
Beaumont, Texas 77713-8509
(Attorney for Intervenor James Hyden)

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties To This Proceeding	ii
Table of Contents	iv
Table of Authorities	v
Reference To Opinion Of Court of Appeals	1
Statement Of Jurisdiction	2
Constitutional Provision Involved In The Case	2
Statement Of The Case	2
Reasons For Allowance Of The Writ	3
Conclusion and Prayer	5
Certificate Of Service	7
Appendix:	
Opinion of the Court of Appeals	1a
Opinion on Motion For Rehearing	30a
Summary of the Record	31a

TABLE OF AUTHORITIES

CASES	Page
Florio v. State, 814 S.W.2d 778 (Houston 14th Court of Appeals 1991, PDR granted)	4, 5
Grady v. Corbin, ____U.S.____, 110 S. Ct. 2084, 109 L.Ed.2d 548 (1990)	3, 5
State v. Magazine, 393 S.E.2d 385 (South Carolina Supreme Court (1990)	4
United States v. Felix, 926 F.2d 1522 (10th Cir. 1991)	4

STATUTES	
20 U.S.C. § 2241	2
28 U.S.C. § 2251	2
28 U.S.C.A. § 1291	3

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS E. LADNER,
Petitioner

v.

J. B. SMITH, ET AL,
Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas E. Ladner, prays that a Writ of Certiorari issue to review the Judgment of the Fifth Circuit Court of Appeals in this case.

REFERENCE TO OPINION OF COURT OF APPEALS

The Opinion (941 Fed.2d 356) and Judgment of the Fifth Circuit Court of Appeals, the dissenting opinion, and the Order Denying Rehearing, are printed in the Appendix.

STATEMENT OF JURISDICTION

The Opinion and Judgment of the Fifth Sircuit Court of Appeals was entered on September 12, 1991. Petitioner's Suggestion For Rehearing En Banc was treated by the Fifth Circuit Court as a petition for panel rehearing, and was denied on October 8, 1991. Jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1254. This Petition is timely filed pursuant to Rule 13, United States Supreme Court Rules.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The double jeopardy clause of the Fifth Amendment to the United States Constitution is involved in this case.

STATEMENT OF THE CASE

Thomas E. Ladner filed his petition for writ of habeas corpus under 20 U.S.C. § 2241, contending that a pending State prosecution for murder in the 241st District Court of Smith County, Texas violated his Fifth Amendment guarantee against being twice placed in jeopardy. Bill Horton and James Hyden intervened, as they were also charged with murder in the same Court and the State Judge had consolidated the charges against the three defendants. All three requested a stay of State Court proceedings under 28 U.S.C. § 2251.

The matter was referred to the magistrate, who held an evidentiary hearing and issued a report and recommendation. The petitioner filed objections, and the District Court heard the objections and responses and then denied the petition for writ of habeas corpus and the motion for stay of State Court proceedings. Appellant

then perfected an appeal to the Fifth Circuit Court of Appeals. Petitioner was subsequently convicted of murder and sentenced to 28 years and is presently incarcerated in the state prison in Texas.

The Fifth Circuit Court of Appeals had jurisdiction of this case by virtue of 28 U.S.C.A. Section 1291.

REASONS FOR ALLOWANCE OF THE WRIT

It is respectfully submitted that the case of *Grady v. Corbin*, ____U.S.____, 110 S. Ct. 2084, 109 L.Ed.2d 548 (1990) is directly in point in this case, because the holding of that case is that the law of double jeopardy prevents two trials for the same conduct. The "conduct" for which petitioner was tried twice was the striking of Loyal Garner, Jr. with a slapstick on December 25, 1987 while in the Sabine County jail. Petitioner submits that the holding of the Supreme Court in *Grady* is not at all confusing or nebulous, and in fact is clearly set forth in the first paragraph of the Court's opinion:

> "We hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted".

It is further respectfully submitted that the transcript of the second trial should indeed be considered when testing the double jeopardy claim. One need only to change the word "will" to the word "did" in the fifth

line of the above quotation, to see that this is correct. As a matter of fact, double jeopardy is more clearly established when, as in this case, we can look at the transcript and be sure without any doubt that exactly the same conduct was proved in both cases. As noted in the dissenting opinion by Judge Jolly, the question of whether double jeopardy attaches is no abstract matter when there has been an actual second trial. Comparing the transcript of the two trials is the only sure way to answer the question of whether or not the State did indeed prove conduct in the murder trial that constituted the civil rights offense for which petitioner had already been tried and acquitted. A reading of the two transcripts leaves no doubt of the fact that the State proved the identical conduct in both trials. In fact, the majority opinion recognizes this in the statement at 941 F.2d 363, which appears at page 6073 in the Appendix:

> "We recognize that in the two prosecutions there is an identity of conduct—".

Petitioner submits that *Grady* holds that when this is true, there is double jeopardy.

Petitioner further agrees with the dissenting opinion that the majority opinion "appears to stand alone in its interpretation and application of the *Grady* holding". (page 6077). In addition to the cases from other circuits cited in the dissenting opinion, petitioner refers the Court to *United States v. Felix,* 926 F. 2d 1522 (10th Cir. 1991). Opinions of State Courts of last resort have also interpreted *Grady* as does the dissent in our case. For example, see *States v. Magazine,* 393 S.E.2d 385 (South Carolina Supreme Court 1990). The recent Texas case of *Florio v. State,* 814 S.W.2d 778 (Houston 14th

Court of Appeals 1991, PDR granted) is also directly in point.

The fact is that the petitioner's double jeopardy claim is even stronger than that of the defendant in the *Grady* case, because the first trial here was *not* for a less serious offense. The Sabine County charge (Section 39.021 of the Texas Penal Code) and the Smith County charge (Section 19.02 of the Texas Penal Code) are both classified as felonies "of the first degree". Both are punishable by imprisonment for 5 years to life and by fine not to exceed $10,000 (Section 12.32 of the Texas Penal Code). Therefore, petitioner has *twice* been subjected to a possible sentence of life in prison, when the Court in our case recognizes and acknowledges that there is *identity of conduct* in the two prosecutions. This is a perfect example of the vice discussed by Justice Brennan in *Grady v. Corbin* at 109 L.Ed.2d 562-563.

CONCLUSION AND PRAYER

Petitioner Thomas E. Ladner has now been subjected to two trials for exactly the same conduct—that of causing the death of Loyal Garner, Jr. on December 25, 1987 by striking him with a slapstick. He was acquitted in the first trial, and he was convicted in the second trial and is now incarcerated. Petitioner respectfully submits that if this does not violate the protection against double jeopardy, then there is no such thing as double jeopardy. Petitioner respectfully prays that this Court issue a writ of certiorari to review the Judgment and the Opinions of the Fifth Circuit Court of Appeals, and thereafter reverse the Judgment below

and grant the petition for writ of habeas corpus and order petitioner's release.

Respectfully submitted,

By: _____

MARCH H. COFFIELD
SEALE, STOVER, COFFIELD
& BISBEY
P. O. Box 480
Jasper, Texas 75951
(409) 384-3466

Counsel for Petitioner,
Thomas E. Ladner

APPENDIX

Thomas E. LADNER,
Petitioner-Appellant,

v.

J.B. SMITH, Sheriff, Smith County, Texas, et al.,[1] Respondent-Appellees.

NO. 90—4262.

United States Court of Appeals,
Fifth Circuit.

September 12, 1991.

Police officer who had been acquitted of violating prisoner's civil rights sought writ of habeas corpus on ground that murder prosecution based on same incident would violate double jeopardy clause. The United States District Court for the Eastern District of Texas, Howell Cobb, J., 740 F.Supp. 1254, denied the petition. The officer was convicted of the murder charge in state court before the decision on appeal. The Court of Appeals, Wiener, Circuit Judge, held that prosecution of police officer for murder did not subject officer to double jeopardy; although evidence of officer's beating of prisoner was featured prominently in both prosecutions, officer was not prosecuted in his first trial for any offense

1. At the time Ladner filed his habeas corpus petition, the person from whom habeas relief could be granted was J. B. Smith, sheriff of Smith County, Texas, where Ladner's second trial was held. Now that Ladner has been convicted and incarcerated, the proper party respondent is James A. Collins, Director, Texas Department of Criminal Justice, Institutional Division.

wholly established by proof of conduct that would be used to establish essential element of murder charge.

Affirmed.

L. Grady Jolly, Circuit Judge, filed dissenting opinion.

Appeal from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

WIENER, Circuit Judge:

The instant case presents this court its first opportunity to review a double jeopardy claim in the context of successive prosecutions since the United States Supreme Court handed down its new double jeopardy test in *Grady v. Corbin*, ——U.S.——, 110 S. Ct. 2084, 109 L.Ed.2d 548 (1990). Here, Petitioner-Appellant Thomas E. Ladner, formerly Chief of Police of Hemphill, Texas, appeals the denial of his habeas corpus petition by the federal district court. Ladner contends that successive state prosecutions for the same conduct, when examined under *Grady*, placed him twice in jeopardy for the same offense. Finding that Ladner's murder prosecution in Smith County (second prosecution) did not rise to the level of double jeopardy under *Grady*, we affirm the district court's denial of Ladner's petition.

FACTS AND PROCEDURAL HISTORY

In January of 1988, Ladner was indicted in Sabine County, Texas, under Texas Penal Code § 39.021(a)(1) & (2)—violating the civil rights of a prisoner—for

intentionally subjecting Loyal Garner to bodily injury while in police custody in the Sabine County Jail, knowing that his (Ladner's) conduct was unlawful.[2] Specifically, Ladner was accused of (1) beating Garner about the head and body with a slapstick and with his fists, causing Garner to fall and hit his head against a wall or door or both; and (2) denying Garner medical attention. In March of 1988, Ladner was indicted in Smith County, Texas, for Garner's murder.

In July of 1988, Ladner was tried in Sabine County (first prosecution) and was acquitted by a jury that rendered a general verdict of not guilty. In April of 1990, Ladner was tried in Smith County, and was convicted of muurdering Garner. The murder charge and the civil rights charges arose from precisely the same incident.

Prior to the second prosecution, Ladner had filed a writ of habeas corpus with the Texas district court in Smith County, claiming that the second prosecution by the same sovereign[3] would subject him to double jeopardy. He argued that the prosecution should be barred

---

2. Billy Ray Horton and James Hyden, Sabine County deputy sheriffs, were indicted and acquitted along with Ladner on the civil rights charges, and, with Ladner, were indicted and convicted of murder in the second prosecution. Horton and Hyden intervened in federal district court in the habeas corpus action, but neither joined in this appeal. We, therefore, address this appeal only as it pertains to Ladner.

3. The State of Texas was the plaintiff in both prosecutions. Sabine County had jurisdiction over the first prosecution because Garner's beating occurred there. Smith County had jurisdiction over the second prosecution because Garner died in a hospital in that county. *See* Tex. Crim. Proc. Code Ann. art. 13.07 (Vernon 1977) (the "hitchhiker statute," which permits prosecution in the county where injury is received, death occurred or body found).

by the doctrine of collateral estoppel.[4] The Smith County trial court denied habeas relief, but on appeal the Twelfth Court of Appeals of Texas reversed, holding that the second prosecution would subject Ladner to double jeopardy.[5] The Texas Court of Criminal Appeals granted the state's motion for discretionary review. That court on review, reversed the decision of the Twelfth Court of Appeals and reinstated the state trial court's denial of habeas relief. *See Ladner v. State*, 780 S.W.2d 247 (Tex. Crim. App. 1989) (en banc).

After exhausting his state remedies, Ladner petitioned the federal district court for a writ of habeas corpus, reiterating his double jeopardy claim. The case was heard initially by the magistrate judge who recommended that all relief be denied. Ladner objected to that recommendation but, on subsequent de novo hearing, the district court overruled Ladner's objections, accepted the magistrate judge's recommendation, and denied the writ.[6] Ladner immediately filed a notice of appeal to this court, and the district court granted a certificate of probable cause. Ladner also sought emergency relief from this court pursuant to 28 U.S.C. § 2251, to stay the pending state court proceedings. We refused to grant the requested stay, and Ladner was

---

4. At the time of the second prosecution Ladner argued that the second trial was barred by double jeopardy under the collateral estoppel rule announced in *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970). Ultimately, both the state courts of Texas and the federal district court disagreed, finding that the second prosecution was not barred by *Ashe*.

5. *Ladner v. State*, 790 S.W.2d 671, 677 (Tex. App.—Tyler 1988).

6. The district judge's thorough opinion, issued prior to the *Grady* decision, held that *Ashe* did not bar the second trial. *See Ladner v. Smith*, 740 F.Supp. 1254 (E.D. Tex. 1990).

tried for murder in Smith County. He was convicted by a jury and is now in the custody of the Texas Department of Criminal Justice.

After Ladner's habeas corpus petitions had been denied and after his second trial had ended in his murder conviction, the Supreme Court rendered its decision in *Grady*, announcing a new test for double jeopardy claims arising in the context of successive prosecutions. The sole issue before this court is whether, under the new test enunciated in *Grady*, Ladner's trial for murder in Smith County subjected him to double jeopardy.

DISCUSSION

A. Operable Facts and Holding in *Grady*

In *Grady* the intoxicated defendant drove his car across the center line of the highway and collided with an oncoming car. The driver of that car subsequently died as a result of injuries received in the accident, and the passenger was seriously injured. The defendant was issued two misdemeanor traffic tickets, one for driving while intoxicated (DWI) and the other for failing to keep to the right of the median. The traffic court was not aware that a homicide investigation was pending or even that a death had occurred as a result of the accident. Consequently, the defendant was allowed to plead guilty in traffic court to the two misdemeanor tickets and received a minimal sentence.

Two months later, a grand jury indicted the defendant for reckless manslaughter, vehicular manslaughter, criminally negligent homicide, third degree reckless assault, and DWI. In the bill of particulars the prosecution stated its intention to prove that the defendant had been driving

while intoxicated, had crossed the center line, and had driven at a speed which was excessive under the circumstances. The Supreme Court held that the Double Jeopardy Clause barred the subsequent prosecution because the state, in its own pleadings, confirmed its intention to establish essential elements of the homicide and assault offenses by proving conduct that constituted offenses for which the defendant had already been convicted—DWI and failing to keep to the right of the center line. *Grady*, 110 S. Ct. 2094.[7]

B. Applicability of *Grady* to this Case

[1] *Grady* applies to cases in which a defendant is subjected to successive prosecutions for separate offenses arising out of the same occurrence, regardless of whether the defendant was acquitted or convicted in the first prosecution. *See United States v. Calderone*, 917 F.2d 717, 720 (2d Cir. 1990). The prosecution argues that *Grady* is distinguishable and should not be applied to the facts in the instant case. We disagree. Ladner was prosecuted successively by the same sovereign under two different statutes for two significantly different offenses—civil-rights violation and murder—both of which arose from the same occurrence; the beating of Garner at the jail. That the defendant in *Grady* was convicted in his first prosecution while Ladner was acquitted in his is irrelevant to whether *Grady* applies to Ladner. *See*

---

7. The Court noted that if the state, in the second proosecution, hed left untouched the defendant's conduct of DWI and crossing the center line (for which he had already been prosecuted) and had used only the excessive speed conduct to supply the conduct elements of the homicide and assault charges, there would have been no double jeopardy. *See Grady*, 110 S. Ct. at 2094.

Grady, 110 S. Ct. at 2091. *Grady* addresses all "successive prosecution" situations.

Finding that *Grady* is applicable, we must now determine how its teachings are to be applied.

The Two Phases of Grady

A. Phase I—the *Blockburger* Phase[8]

[2] "*Grady* directs courts to follow a two-step analysis in resolving double jeopardy claims arising in the context of successive prosecutions. First., the court must apply the *Blockburger* test and its traditional exceptions to determine whether the offense charged in the subsequent prosecution 'requires proof of a fact which the other does not.'" *Calderone*, 917 F.2d at 720 (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L.Ed. 306 (1932)); *see also Grady*, 110 S. Ct. at 2090-93. If, in the first phase of the *Grady* analysis, application of *Blockburger* reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, the subsequent prosecution is barred. *Id.* (citing *Brown v. Ohio*, 432 U.S. 161, 166, 97 S. Ct. 2221, 2225, 53 L.Ed.2d 187 (1977)). The second prosecution must also be tested to determine if it is barred under one of the two limited exceptions to *Blockburger* found in *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L.Ed.2d 1054 (1977),

---

8. *Grady* involves a two-step analysis. In the first step, the defendant's claim is analyzed under *Blockburger* and its exceptions; in the second, the analysis is under the new *Grady* "twist." *See Calderone*, 917 F.2d at 720. We have determined that each "step" of Grady actually requires the court to go through a series of analytical steps. Therefore, to avoid confusion we will refer to the first "step" in the *Grady* analysis as the "*Blockgurger* phase," and the second "step" in the *Grady* analysis as the "New *Grady* phase."

and *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970), respectively. *See Grady*, 110 S. Ct. at 2092-93.

In *Harris*, the defendant was prosecuted first for robbery and subsequently for felony murder based on a homicide that occurred during the course of the same robbery. The Supreme Court recognized that the second prosecution would not be barred under *Blockburger* because, on the faces of the relevant statutes, the essential elements of the crimes were different. The Court held, however, that the defendant's second prosecution constituted double jeopardy because the felony murder prosecution would necessarily require the defendant to defend against the robbery charge for which he had already been prosecuted. While in that case the robbery was not truly a lesser included offense of murder, the Court nonetheless categorized it as "a *species* of lesser-included offense." *See Grady*, 110 S. Ct. at 2093 (emphasis added) (quoting *Illinois v. Vitale*, 447 U.S. 410, 420, 100 S. Ct. 2260, 2267, 65 L.Ed.2d 228 (1980)).

In *Ashe*, the Supreme Court held that the doctrine of collateral estoppel prevents a second prosecution arising from the same incident when that prosecution would require relitigation of factual issues that were necessarily resolved in the defendant's favor in the first prosecution. *Ashe*, 397 U.S. at 443, 90 S. Ct. at 1193-94. Under this doctrine, acquittal in the first prosecution bars subsequent prosecution unless a reviewing court can conclude that a "rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444, 90 S. Ct. at 1194.

Thus, to determine whether Ladner's second prosecution is barred by double jeopardy under the *Blockburger* phase of *Grady*, we first must apply the *Blockburger* test itself. But even if the second prosecution survives *Blockburger*, we still must determine whether Ladner's second prosecution is barred under *Harris* or *Ashe*.

B. The *Blockburger* Phase Applied to Ladner

[3] Ladner's subsequent prosecution for murder survives the *Blockburger* test, The statutory elements of murder differ from the statutory elements of violating a prisoner's civil rights.[9] Specifically, each offense requires proof of an element that need not be proved in the other: Death need not be proved for a civil rights conviction; neither police custody of the victim nor peace officer status of the defendant need be proved for a murder conviction. Moreover, each offense requires proof of different facts for their respective intent or mens rea

---

9. Ladner was charged under two statutes for violating a prisoner's civil rights:

(1) Tex. Penal Code Ann. § 39.021(a)(1) whose elements are: (1) a peace officer employed at a jail, (2) intentionally subjects, (3) a person in custody, (4) to bodily injury, (5) knowing his conduct is unlawful.

(2) Tex. Penal Code Ann. § 39.021(a)(2) whose elements are: (1) a peace officer employed at a jail, (2) willfully denies or impedes, (3) a person in custody, (4) in the exercise or enjoyment of any right, privilege, or immunity, (5) knowing his conduct is unlawful.

The elements of murder under Texas Penal Code Ann. § 19.02 (a)(1) & (2) for which Ladner was charged in the Indictment are:

(1) a person, (2) intentionally or knowingly causes the death of an individual, or (3) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes death.

elements: For the civil rights violation the prosecution must prove that Ladner acted intentionally or willfully and had actual knowledge (subjective) that his action was unlawful; for the murder charge the prosecution must prove that Ladner acted "intentionally or knowingly," i.e., with specific intent (objective). Therefore, the prosecution's first hurdle, the *Blockburger* test, is cleared.

Ladner's second prosecution also clears the post-*Blockburger* hurdles of *Harris* and *Ashe*. Ladner's second prosecution did not require proof of every element of the civil rights violations; neither is the civil rights violation either a true lesser included offense of a murder charge or a "species" of lesser included offense of murder. Therefore, Ladner's second prosecution is not barred by *Harris*. In the *Blockburger* phase, that leaves only *Ashe* to be considered.

Before *Grady* was decided, Ladner relied on the collateral estoppel rule in *Ashe* to support his double jeopardy claim. We find that reliance misplaced. Ladner argues that the only issue in dispute in the first prosecution on which the jury could have acquitted him was whether he was justified in striking Mr. Garner.[10] In insisting that no rational jury could have acquitted him on the question of whether he knew his actions were unlawful. Ladner attempted to foreclose reconsideration

10. The only defenses for civil rights violations under Tex. Penal Code Ann. §§ 39.021(a)(1) & (2) are that the officer used justifiable force in defense of the institution or his own person, or that the officer did not know that his conduct was unlawful. *See* Tex. Penal code Ann. §§ 9.53, 39.021(a)(1) & (2) (Vernon 1989 & Supp. 1991). Therefore, these are the only two issues upon which the jury could have acquitted because the defendant did not dispute that all other elements of the crimes were present.

of the issue of justification under Ashe, claiming that the jury necessarily decided in his favor on that issue.[11] But we agree with the district court's determination that, as a matter of law, the jury might have acquitted Ladner on an issue other than justifiication so that the second prosecution was not barred by the collateral estoppel doctrine of *Ashe*. The district court found, and we agree, that under the jury's general verdict of not guilty, acquittal *could* have resulted from the jury's belief that Ladner did not know his conduct was unlawful. It cannot be said that no rational jury could have reached this conclusion.

Having thus tested Ladner's second prosecution under the three steps required by the *Blockburger* phase of *Grady*, and found that it is not barred, we must proceed to phase II of *Grady*.

C. Phase II—The New *Grady* Phase

[4] *Grady* instructs the examining court that if the indictment[12] in the second prosecution survives *Blockburger* and its exceptions (the *Blockburger* phase), that prosecution must be tested further to determine if, "to establish an *essential element* of an offense charged in

11. *See supra* note 4 and accompanying text.

12. Because double jeopardy ensures that a defendant not be subjected to a subsequent trial for the same offense, we look only to the charges as set out in the indictment to determine if Ladner was placed in double jeopardy. Although in this instance the transcript of Ladner's second trial is available, it is irrelevant because, under *Grady*, the critical inquiry is what conduct the state proposes to use in the second prosecution to prove the essential elements of the second prosecution offenses, and whether that conduct constitutes an offense for which the defendant was already prosecuted. *See Grady*, 110 S. Ct. at 2093. The conduct actually proven in the second trial has no bearing on the question of double jeopardy.

[the second] prosecution, the government will prove *conduct* that constitutes an *offense* for which the defendant has already been *prosecuted*." *Grady*, 110 S. Ct. at 2087 (emphasis added).

In the short time since the opinion in *Grady* was published, some courts and commentators have referred to the second phase of *Grady* as a "same conduct" test. *See United States v. Gonzalez*, 921 F.2d 1530, 1538 (11th Cir. 1991); *United States v. Russo*, 906 F.2d 77, 78 (2d Cir. 1990). But when the pure holding of *Grady* is carefully parsed, such a limited interpretation is found to be an oversimplification. *Grady* requires much more than a mere search for congruity of conduct. Moreover, if we were to look solely to the conduct that occurred during the subject incident to determine whether *Grady's* second phase test is satisfied, we would risk transforming *Grady's* new test into a "same transaction" test, an interpretation expressly and unequivocally rejected by the Court. *See Grady*, 110 S. Ct. at 2094 n. 15. *But see id.* at 2105 (Scalia, J., dissenting) ("prosecutors . . . will be well advised to proceed on the assumption on that the 'same transaction' theory has already been adopted"). Finally, we conclude that Grady should not be read to establish either a "same veidence" or "same offense" test. *Id.* at 2093.

Thus, the second phase of the *Grady* analysis requires more than merely comparing the acts alleged in the first prosecution with those alleged in the second to determine whether they overlap. Rather, in the second phase of *Grady* the examining couri must take the following four analytical steps in sequence to determine whether double jeopardy bars the second prosecution:

1. Identify each *essential element* of the offense with which the defendant is charged in the second prosecution.
2. Determine what *conduct* of the defendant the state proposes to prove to establish each essential element identified in step one.
3. Examine the conduct determined in step two to see if, in and of itself, such conduct constitutes one or more separate and distinct *offenses* for which a person could be prosecuted.
4. Determine whether, in the first prosecution, the defendant was in fact *prosecuted* for one or more of the separate and distinct offenses found in step 3.

If the examining courts gets to the fourth step and finds in the affirmative, the second prosecution would be barred by the Double Jeopardy Clause. But if the court answers either the third or fourth step in the negative, there would be no double jeopardy bar to the second prosecution.

D. Application of *Grady's* New Four Step Test to Ladner

[5] At the first step we seek to identify the *essential elements* of the offense (murder, with which Ladner is charged in the second prosecution. In doing so we find that the first essetial element of that offense is the degree of criminal intent or mens rea, here acting "intentionally and knowingly." And we find that the second essential element of the offense of murder is the overt act of the defendant, here that he "cause[d] the death of an individual" or, alternatively, "intend[ed] to cause

serious bodily injury and commit[ted] an act clearly dangerous to human life that causes death."

At the second step we seek to determine precisely what *conduct* the state proposes to prove in establishing each of the essential elements identified in the first step. The conduct alleged in the indictment for the second prosecution is that Ladner beat Garner about the head with a slapstick, a nightstick and an object unknown, thereby intentionally and knowingly causing his death; or alternatively that Ladner intentionally and knowingly committed an act clearly dangerous to a human life by striking Garner in that manner.

At the third step, we examine the conduct we found in the second step to determine whether such conduct constitutes one or more separate *offenses* for which *Ladner* could be prosecuted separately. Clearly the conduct that the state proposes to use in proving the essential elements of murder—Ladner's brutal beating of Garner—would constitute any number of separate and distinct homicide offenses (such as murder, voluntary manslaughter, involuntary manslaughter, or criminally negligent homicide) as well as several non-lethal excessive force offenses (such as aggravated assault or assault), for which Ladner could have been prosecuted separately. Thus, the question posed in the third step of the second phase of *Grady* is answered affirmatively.

As the third step was answered affirmatively, we must proceed to the fourth and final step of *Grady's* second phase. At this final step we must determine whether Ladner was in fact *prosecuted* in the first (civil rights) trial for any separate and distinct offenses constituted by conduct that the prosecution would have to prove

to establish an essential element in the second (murder) trial. Our conclusion is c*learly not*. In the first trial Ladner was *not* prosecuted for any of the various homicide offenses; neither was he prosecuted for assault, aggravated assault, or any other non-lethal excessive force offenses. The essential element at issue in Ladner's prosecution for murder is the physical element that the prosecution stated it would prove by evidence of Ladner's beating of Garner. Although this conduct alone (the beating) may constitute a number of separate and distinct offenses (such as aggravated assault, assault, etc.), none of those distinct offenses are offenses for which Ladner was in fact tried in the first prosecution.

Ladner was tried only for violating Garner's civil rights. Each such offense involved the physical injury element *plus* three additional elements: a prisoner in custody, a peace officer as malefactor, and the subjective knowledge of such peace officer that his action was illegal. The beating alone does *not* constitute the offense of violating a prisoner's civil rights. Moreover, none of the three additional elements, nor the civil rights offense itself, are required to be proved by the prosecution in Ladner's subsequent trial to establish an essential element of murder. Therefore, even though Ladner's conduct (the beating) constitutes any number of offenses (aggravated assault, assault, etc.), and even though that same conduct (the beating) would necessarily be used to establish essential elements in Ladner's murder trial, Ladner was never before prosecuted for any offense based solely on that "conduct." In and of itself, the conduct to be proved to establish an essential element in the second (murder) prosecution does not

constitute either of the civil rights violations for which he was previously prosecuted.

We recognize that in the two prosecutions there is an identity of conduct—evidence of Ladner's beating of Garner featured prominently in both prosecutions. But the fact that the same evidence may be presented in both trials is irrelevant. *See Grady,* 110 S. Ct. at 2094 & n. 15. The critical inquiry is whether an essential element of the offense charge in the second prosecution requires proof of conduct that constitutes a separate and distinct offense for which Ladner has already been prosecuted.

In *Grady*, the defendant was prosecuted in his first trial for specific *offenses*—DWI and crossing the center line—established by *conduct* that in the second prosecution the state's bill of particulars stated would be used to prove the *essential elements* of the vehicular homicide and assault offenses. By contrast, Ladner was not *prosecuted* in his first trial for any *offense* wholly established by proof of *conduct* that would be used to establish an *essential element* of an offense charged in his second prosecution. In no way did the beating (an essential element in the murder charge), in and of itself, constitute either offense for which Ladner was tried in the first prosecution.

E. The Lesson of *Grady*

[6] *Grady* teaches that, in the context of successive prosecutions, the Double Jeopardy Clause bars the subsequent prosecution if the government will prove conduct that establishes an essential element of an offense charged in the second prosecution and that conduct, in and of

itself, constitutes an offense for which the defendant was tried in the initial prosecution. Again, Ladner was *not* prosecuted in his civil rights trial for any offense constituted solely by conduct the proof of which would have been used to establish an essential element of the murder offense for which he would be tried in the second prosecution.[13]

Further, *Grady* admonishes that it is establishing neither an "actual evidence" or "same evidence" test, nor a "same conduct" or "same transaction" test. Rather, the new second phase test of *Grady* is a complex, skillfully crafted four step test: "The Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish [1] an *essential element* of an offense charged in that prosecution will prove [2] *conduct* that constitutes [3] an *offense* for which the defendant has already been [4] *prosecuted.*" *Grady*, 110 S. Ct. at 2093 (emphasis added). When those four steps are faithfully followed in the instant case, the conclusion is inescapable that Ladner's second prosecution survives not only *Grady's* first phase tests of *Blockburger* and its exceptions, but the new, second phase four-step test of *Grady* as well. Clearly, Ladner's second prosecution was not barred by the Double Jeopardy Clause.

CONCLUSION

Grady is new and its lesson even if carefully analyzed and painstakingly administered, is not easy to apply. As demonstrated above, applying *Grady's* new test to

---

13. We are aware that Ladner has already been tried a second time. But, because double jeopardy should be tested prior to a second trial, on basis of the indictment in that prosecution or the bill of particulars or some such similar document, the noted sentence is written in the subjunctive mood. *See supra* note 12.

Ladner's cricumstances is considerably more arduous than applying it to the more straightforward circumstances of Grady itself.[14] A strict reading of *Grady*, however, convinces us that our interpretation is accurate and that the result reached in this case is correct, albeit opposite from the final result of *Grady*. In that case the defendant obviously had been prosecuted in his first trial for offenses constituted by conduct the proof of which the State proposed to use in establishing essential elements of the crimes charged in the seconnd prosecution. In the instant case the reverse is true: Ladner was never prosecuted in Sabine County for an offense constituted by conduct that would be used by the State in Smith County to prove an essential element of the offense of murder. The sole similarity in the two prosecutions of Ladner is the congruity of conduct (the beating) which the prosecution used as evidence of each offense. Under *Grady* that simply is not enough to produce a double jeopardy bar.

Because we find that Ladner's Smith County prosecution for the murder of Loyal Garner was not barred by the Double Jeopardy Clause, the judgment of the district court denying Ladner's petition for writ of habeas corpus is AFFIRMED.

---

14. An even more complex circumstance is presented by situations in which one of the prosecutions at issue is for RICO or complex conspiracy-type offenses. The circuits are split on the applicability of *Grady* to such cases. *See, e.g. United States v. Esposito*, 912 F.2d 60, 64 (3d Cir. 1990) (*Grady* does not bar prosecution on substantive drug offenses that supported predicate acts charged in RICO counts of earlier indictment); *United States v. Russo*, 906 F.2d 77, 78 (2d Cir. 1990) (proosecution for which the first prosecution for RICO conspiracy was based, is inconsistent with the conduct test announced in *Grady*). We express no opinion on this subject, as Ladner's appeal does not present any such circumstance.

E. GRADY JOLLY, Circuit Judge, dissenting:

Because the outcome of the test devised by the majority is impermissibly contingent on the sequence of the successive prosecutions, because application of the test unnecessarily creates conflicts with other circuit courts, because I cannot agree that we should consider only the indictment in determining whether double jeopardy has attached in a case that has already been tried, and, finally, because the majority opinion confuses the analysis under *Grady*, a conduct analysis. with the traditional definition of "same offense" under *Blockburger*, I respectfully dissent from the distinguished majority and its scholarly effort.

I

The first evident flaw in the majority's test is that whether double jeopardy attaches is contingent on the order in which the cases are tried. What an odd result; not only odd, however, but apparently unconstitutional. The Supreme Court held in *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 2227, 53 L.Ed.2d 187 (1977), that "whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser offense. Furthermore, in *Grady*, Justice Brennan cited *Brown* for this proposition. *Grady*, 110 S. Ct. at 2093 n. 11. I have found no court after the *Brown* decision that has read the double jeopardy clause as protecting a defendant's right to be tried in a certain order.

Here, although the majority devises a four-part test claiming to *implement Grady*, if we reverse the order of trials in *Grady* and apply the majority's test, double jeopardy would not in fact attach; to have proved the

misdemeanors, the government would not have proved conduct that constituted the entirety of the previously prosecuted offense of vehicular manslaughter. It is clear, however, that the *Grady* court did not intend such a constitutionally unsatisfactory result: "[I]f in the course of securing a conviction for one offense the State necessarily has proved the conduct comprising all of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause would bar subsequent prosecution of the component offense." *Grady*, 110 S. Ct. at 2093 n. 11.

The majority is silent on this glitch in its analysis.

II

Second, the majority has devised a test that is in conflict with virtually every decision by other circuit courts that have applied the *Grady* test. Again, however, this conflict arises entirely from the significance that the majority's test places on the order of successive prosecutions.

In *United States v. Gonzalez*, 921 F.2d 1530 (11th Cir. 1991), the Eleventh Circuit held that *Grady* did not bar a conviction for conspiring to violate RICO even though the defendant had previously been prosecuted for various drug offenses including possession, importation, and conspiracy. These crimes were used as RICO predicates in the second prosection. The Eleventh Circuit reasoned that *Grady*, by its facts and the facts of the cases it relied upon, is limited to single-act crimes. It then determined that the conduct proved in the first prosecution was the defendant's role in each substantive crime; in the second prosecution, the conduct proved

was the defendant's agreement. Although the two prosecutions may be part of the same transaction or proved by the same evidence, the Eleventh Circuit concluded that the second prosecution did not constitute double jeopardy under the new analysis presented in *Grady*. *See also United States v. Farmer,* 923 F.2d 1557 (11th Cir. 1991) (no double jeopardy bar to trial of substantive count after prior acquittal of conspiracy count because essence of conspiracy is proof of an agreement which prosecution did not seek to prove to second jury).

The Third Circuit likewise concluded in *United States v. Pungitore,* 910 F.2d 1084, 1111 (3d Cir. 1990), that "[h]owever significant *Grady v. Corbin* may prove to be in cases of simple felonies . . . it has nothing whatsoever to do with the compound-complex [RICO] crimes at issue here." In *Pungitore*, the defendant had argued that double jeopardy barred his RICO prosecution because he had been previously convicted of extortion, one of the predicate acts involved in the RICO charge. *See also United States v. Esposito,* 912 F.2d 60, 64 (3d Cir. 1990) (*Grady* does not bar prosecution on substantive drug offenses that supported predicate acts charged in RICO count of earlier indictment).

An opposite result was reached by the Second Circuit in *United States v. Russo,* 906 F.2d 77, 78 (2d Cir. 1990). In that case the government conceded that "prosecution of the obstruction of justice charges [the predicate act upon which the RICO conspiracy charge was based] following acquittal of the RICO conspiracy . . . was inconsistent with the 'conduct' test announced in *Grady.*" Similarly, in *United States v. Calderone,* 917 F.2d 717, 721 (2d Cir. 1990), the Second Circuit held

that a second drug conspiracy prosecution was barred by *Grady's* same-conduct test after an earlier and larger conspiracy prosecution resulted in a judgment of acquittal. In *Calderone,* the court rejected the government's argument that the conduct in conspiracy cases is the alleged agreement itself, rather than the acts from which the agreement can be inferred. Such a view, according to the Second Circuit, would require courts to examine the offenses charged, as *Blockburger* requires rather than the conduct that constitutes the offense, as *Grady* demands. The court then concluded that the second conspiracy prosecution was barred by double jeopardy because the conduct relied upon by the government to prove the existence of the conspiracy in the second prosecution was the same as that relied upon in the first, the only difference being that the defendant was charged with a broader, longer, multi-drug conspiracy in the first prosecution.

How the majority's test would affect the outcome of the above decisions depends, of course, on the order of the prosecutions. In the case of a defendant who is first prosecuted for a RICO offense and then prosecuted for the separate crimes constituting the RICO predicate acts, double jeopardy would not be implicated under the majority's test. This is true because, to establish the lesser crimes in the second prosecution, the government would not prove conduct that constituted the RICO offense; although the lesser crimes may have been elements of the prior RICO offenses, they were not themselves the subject of a prior prosecution. *Cf. Calderone,* 917 F.2d at 725 (Newman, J., concurring) (proposing that under *Grady* test, conduct must be either entirety of offense previously prosecuted or entirety of any element

of prior offense). On the other hand, in the case of a defendant who is tried first for the separate crimes constituting the RICO predicate acts and then tried for the RICO offense, double jeopardy would be implicated under the majority's test, because, to establish an essential element of the RICO violation, the government would prove conduct that constituted the entirety of the previously prosecuted offenses.

Thus, under the majority's test, a previous trial for RICO predicate acts would bar a second trial for RICO conspiracy, although the Eleventh Circuit reached the opposite results in *Gonzalez*. Moreover, the majority's test would not allow a RICO prosecution after a conviction for the predicate acts, although in *Pungitore*, the Third Circuit rejected such a double jeopardy challenge. Furthermore, this view of the majority is not consistent with the Second Circuit's decision in *Russo* that barred a second prosecution on double jeopardy grounds under a similar fact situation, because in *Russo*, the RICO conspiracy was prosecuted first. The majority would not have barred the second prosecution because the RICO predicate acts charged in the second prosecution would not be proved by conduct that constituted the entirety of the prior RICO conspiracy prosecution.

In sum, by adopting the majority's four-part test, the Fifth Circuit appears to stand alone in its interpretation and application of the *Grady* holding.

III

Third, what I find perhaps the most inexplicable about the majority's treatment of *Grady's* conduct test is its notion that the transcripts of the two trials are somehow irrelevant to a determination as to whether the state proved

the same conduct in each trial. The majority is fully willing to blindfold itself to avoid knowledge of the "actual" facts. It thus declares, in effect, that the trials did not occur and asks only whether this defendant, who has been through the manifest reality of two trials, has theoretically been exposed to double jeopardy. The majority says, "We look only to the charges as set out in the indictment to determine if Ladner was placed in double jeopardy," and "the conduct actually proven in the second trial has no bearing on the question of double jeopardy." Majority Opinion slip opinion at 6071 n. 12.

Declaring undeniable conduct as non-conduct smacks of an Orwellian approach to justice.

The holding of *Grady* is straightforward, especially when, as here, the question of double jeopardy arises after the second prosecution:

> We hold that the Double Jeopardy Clause bars [the] subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government [proved] conduct that constitutes an offense for which the defendant has already been prosecuted.

Grady, 110 S. Ct. at 2087.

Here, there has been an actual second prosecution; whether double jeopardy attaches is no abstract matter. The specific issue before us is whether the government did indeed prove conduct in the murder trial that constituted the civil rights offense for which Ladner had already been prosecuted. There is only one sure way to analyze this question: compare the transcripts of the respective trials—not theorize about "what if," when "if" has become a fact.

I challenge the majority to read the transcripts for both trials and then attempt to argue against the proposition that, as a matter of demonstrable fact and palpable reality, in the murder prosecution the state proved the entirety of the conduct for civil rights offense for which Ladner was prosecuted. The transcripts lend themselves to but one conclusion, the state proved the *identical* conduct to prove murder as it did to prove the civil rights offense. The offense of murder in Texas includes the following statutory elements:

1. a person intentionally and knowingly
2. cause[d] the death of an individual or
3. intended to cause serious bodily injury and commit[ted] an act clearly dangerous to human life that causes death.

See Tex. Penal Code § 19.02(a)(2). To establish its murder case against Ladner, the state proved the following conduct: Ladner, the chief of police, entered Garner's jail cell and hit Garner three or four times on the head with a slapstick without justification, resulting in Garner's death. The murder trial "conduct" easily supports a verdict of guilty for the crime containing the following elements:

1. a peace officer
2. intentionally subjects
3. a person in custody
4. to bodily injury
5. knowing his conduct is unlawful.

See Tex. Penal Code Ann. § 39.021(a)(1). Although in the civil rights trial, the state was, of course, required to prove Ladner's knowledge of the unlawfulness of his conduct, this element was clearly a reasonable inference to be drawn from the conduct described above; indeed, the element of mental state was satisfied in each trial from essentially the same conduct.[1]

Nevertheless, the majority eschews the need to compare the conduct in the respective prosecutions, thus, once again blithely ignoring *Grady*. The *Grady* Court expressly compared the conduct in each of the prosecutions to conclude that the second prosecution was barred:

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses. Therefore the Double Jeopardy Clause bars this successive prosecution. . . .

Grady, 110 S. Ct. at 2094.

Here, it is not disputed that the state has proved the entirety of the conduct for which Ladner was prosecuted in the civil rights trial to establish the essential elements of the murder offense.

---

1. At the civil rights trial, the state argued that Ladner's knowledge of the unlawfulness of his conduct was also shown through Ladner's testimony about his prior training in the appropriate use of force against prisoners. He did not testify at his murder trial. The violent beating, however, spoke for itself; a reasonable juror could easily have concluded that Ladner possessed knowledge of the unlawfulness of his conduct.

IV

Fourth, I respectfully suggest that a crucial error in the analysis of the majority is its confusion of the "same conduct" test of *Grady* with the *Blockburger* analysis of "same offense." The majority certainly is correct to consider *Blockburger* as a "first prong" in its analysis and to point out that the civil rights violation required three additional elements that are not included in the murder offense, i.e., peace officer, custody, and knowledge. The majority's error, however, is to revert to a discussion of the statutory elements in the second step of its two-step analysis when it has already concluded in the first step that the statutory elements survive the *Blockburger* test of "same offense." Under *Grady,* the *focus* of the double jeopardy analysis is on the *conduct,* proved or to be proved in the respective trials, and not on the statutory elements. Thus, the majority's analysis of the *Grady* holding slips into what is hardly more than another application of *Blockburger.*

V

With great respect for the hard work of my colleagues, I view *this case* more simply than does the majority. I would devise no complex *Grady* test; I would only decide the case before us. I would hold that here we only need ask whether, based on conduct shown by the state in the second trial, at any point therein, a properly instructed jury could return a verdict for the previously prosecuted offense. Double jeopardy attaches if the inquiry is answered in the affirmative, because at that point it becomes absolutely clear that the government has proved conduct that constitutes the offense of the first

prosecution. In short, there was a point in the murder prosecution where the state had unavoidably (or perhaps necessarily) proved that Ladner, a peace officer, physically assaulted and, thus, caused the death of Garner while in custody. A reasonable jury could infer from this conduct, including a violent beating, that Ladner knew he was violating Garner's civil rights.

Undergirding this approach is my belief that it is a mistake, likely to boomerang, to establish any specific test for application in all cases in which the defendant raises a double jeopardy challenge under *Grady*. My view is supported by Justice Scalia's statement in his dissent that "[i]t is not at all apparent how a court is to go about deciding whether the evidence that has been introduced . . . at the second trial proves conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 110 S. Ct. at 2104. Thus, when it is clear, as it is to me here, that the same conduct was used to establish the offense in each prosecution, I would go no further in the analysis.

For the reasons set forth here, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Gilbert F. Ganucheau
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, LA 70130

September 12, 1991

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 90-4262 — Ladner v. Smith, et al.

Enclosed is a copy of the Court's decision this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, FRAP and Local Rules 39 and 41 govern costs, petitions for rehearing and mandates. *A petition for rehearing must be filed in the Clerk's Office within fourteen (14) days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Criminal Appeals. Local Rule 41 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal* appeal filed under FRAP 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By: /s/ DAWN EISERLOH
Deputy Clerk

Enclosure

Mr. John H. Seale
Mr. Michael J. Sandlin
Mr. Rex Hall
Mr. Charles Palmer

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-4262

THOMAS E. LADNER,
Petitioner-Appellant,

versus

J. B. SMITH, Sheriff Smith County, Texas, ET AL.,
Respondents-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas

(Filed October 8, 1991)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9-12-91, 5th Cir., 198__, 941 F.2d 356)

(OCTOBER 8, 1991)

Before GOLDBERG, JOLLY and WIENER, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. W. WIENER, JR.
United States Circuit Judge

SUMMARY OF THE RECORD

On January 5, 1988, an indictment was returned against petitioner in the First Judicial District Court of Sabine County, Texas, charging him with a violation of Section 39.021 of the Texas Penal Code. Count one of the indictment charged that the defendant did then and there on December 25, 1987 "intentionally subject Loyal Garner, Jr., a person in custody, to bodily injury, to-wit: by hitting Loyal Garner, Jr. on his head and body with a slapstick and fists and causing Loyal Garner, Jr. to fall and strike his head against a wall and door; knowing his conduct was unlawful, and the death of Loyal Garner, Jr. occurred therefrom" (Record on Appeal 12).

Thereafter on March 3, 1988, an indictment was returned against petitioner in the 241st District Court of Smith County, Texas. This indictment charged that defendant did then and there on December 25, 1987 "intentionally and knowingly cause the death of an individual, Loyal Garner, Jr., by striking him about the head with a slapstick", etc. (Record on Appeal 14), or alternatively "intentionally and knowingly commit an act clearly dangerous to human life, to wit: by striking the said Loyal Garner, Jr. about the head with a slapstick," etc., "and thereby causing the death of Loyal Garner, Jr." (Record on Appeal 14).

After a jury trial in Sabine County, Texas, petitioner was acquitted on both counts of the Sabine County indictment on Friday, July 15, 1988. 241st District Judge Joe Tunnell had set the Smith County case for trial on the following Monday, July 18, 1988, and he held a hearing on Saturday, July 16, 1988 on petitioner's State Court habeas corpus petition, and denied relief.

On appeal, the three-judge Court of Appeals at Tyler unanimously reversed the Order of the trial court, and ordered the petitioner released and discharged. The State petitioned the Texas Court of Criminal Appeals, for discretionary review. Such petition was granted and the Court of Appeals was reversed in a 7 to 2 decision. *Ladner vs. State,* 780 S.W.2d 247 (Texas Criminal Appeals 1989). Motion for rehearing was overruled, and thus all State remedies were exhausted.

Petitioner then filed his petition for writ of habeas corpus in the Eastern District of Texas, where the Court found jurisdiction, venue, standing and exhaustion of remedies (Record on Appeal 171). All relevant portions of the State Court records concerning the Sabine County civil rights trial were presented to the District Court for review (Record on Appeal 173), and were brought forward for review by the Court of Appeals. (Record on Appeal 188).

The District Court reasoned that the term "knowing his action was unlawful" must be determined subjectively (Record on Appeal 179), and therefore concluded that a rational jury could have acquitted because the State had failed to prove actual knowledge that his conduct was unlawful (Record on Appeal 183). The District Court therefore denied the writ. Petitioner immediately filed a notice of appeal to this Court, and the District Court granted a certificate of probable cause.

The Court of Appeals panel in this case requested a transcript of the second trial and this was provided, so that the Court of Appeals then had available the transcript of both trials.

Supreme Court, U.S.
FILED
JAN 13 1992
OFFICE OF THE CLERK

(2)

No. 91-934

In The

Supreme Court of the United States

October Term, 1991

THOMAS E. LADNER,

Petitioner,

v.

J.B. SMITH, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JACK SKEEN, JR.*,
Criminal District Attorney
403 Smith County Courthouse
Tyler, Texas 75702
903/535-0520
*Counsel of Record

AMY R. BLALOCK,
Assistant Criminal District Attorney
403 Smith County Courthouse
Tyler, Texas 75702
903/535-0520

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Petitioner has adequately exhausted his state court remedies.

(2) Whether *Grady v. Corbin* should be expanded to preclude the presentation of specific evidence in a subsequent prosecution, although the State was not required and did not seek to use this evidence to prove conduct that would constitute an offense for which the Petitioner had already been prosecuted.

PARTIES TO THIS PROCEEDING

The names of the parties to this proceeding are as follows:

1. Thomas E. Ladner
   P.O. Box 111
   Hemphill, Texas 75948
   (Petitioner)

2. J.B. Smith, Sheriff
   Smith County Courthouse
   Tyler, Texas 75702
   (Respondent)

3. Jim Mattox, Attorney General of Texas
   P.O. Box 12548, Capitol Station
   Austin, Texas 78711
   (Respondent)

4. Joe Tunnell, District Judge
   241st District Court
   Smith County Courthouse
   Tyler, Texas 75702

5. Bill Horton
   Hemphill, Texas 75948
   (Intervenor)

6. James Hyden
   Hemphill, Texas 75948
   (Intervenor)

7. John H. Seale and March H. Coffield
   P.O. Box 480
   Jasper, Texas 75951
   (Attorneys for Petitioner)

PARTIES TO THIS PROCEEDING – Continued

8. Jack Skeen, Jr.
Criminal District Attorney
403 Smith County Courthouse
Tyler, Texas 75702

9. Kenneth D. Nash, Michael J. Sandlin, Frank W. Henderson, and Amy R. Blalock
Assistant Criminal District Attorneys
403 Smith County Courthouse
Tyler, Texas 75702

10. C. Rex Hall, Jr.
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(Attorney for Respondents)

11. Charles Palmer
Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(Attorney for Respondents)

12. Jeff L. Haas
908 First Place
Tyler, Texas 75702
(Attorney for Intervenor Bill Horton)

13. Paul Buchanan
1640 North Major Drive, #201
Beaumont, Texas 77713-8509
(Attorney for Intervenor James Hyden)

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to This Proceeding ii

Table of Contents iv

Table of Authorities v

Statement of Jurisdiction 1

Constitutional Provision Involved in the Case 2

Counter Statement of the Case 2

Reasons For Denying the Writ 5

Conclusion and Prayer 14

Appendix:

Opinion of the 12th Court of Appeals of Texas ... A-1

Opinion of the Court of Criminal Appeals of Texas B-1

TABLE OF AUTHORITIES

Page

Cases

Anderson v. Harless, 459 U.S. 4 (1982) 6

Ashe v. Swenson, 397 U.S. 436 (1970) 4

Braudrick v. State, 572 S.W.2d 709 (Tex.Cr.App. 1978) 11

Dowling v. U.S., 493 U.S. 342, 110 S.Ct. 668 (1990) ..9, 10

Garrett v. United States, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985) 9

Grady v. Corbin, ___ U.S. ___, 110 S.Ct. 2084 (1990) *passim*

Ladner v. Smith, 941 F.2d 356 (5th Cir. 1991) 7

Ladner v. State, 790 S.W.2d 671 (Tex.App. – Tyler, 1988), *rev'd.*, 780 S.W.2d 247 (Tex.Cr.App. 1989) 6

Picard v. Connor, 404 U.S. 270 (1971) 6

Ex parte Rathmell, 717 S.W.2d 33 (Tex.Cr.App. 1986) 12

United States v. Felix, 926 F.2d 1522 (10th Cir. 1991), *cert. granted*, 112 S.Ct. 47 (1991) 13

Ussery v. State, 651 S.W.2d 767 (Tex.Cr.App. 1983) 11

Statutes

Texas Penal Code, § 19.02(a)(1) 11

Texas Penal Code, § 19.02(a)(2) 11

Texas Penal Code, § 39.021 10

United States Supreme Court Rule 13 2

28 U.S.C. § 2254 6

28 U.S.C.A. § 1254 1

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

United States Constitution, Fifth Amendment. .2, 7, 8, 9

No. 91-934

In The

Supreme Court of the United States

October Term, 1991

THOMAS E. LADNER,

Petitioner,

v.

J.B. SMITH, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

To The Honorable Justices of
The Supreme Court Of The United States:

J.B. Smith, et al., Respondents, file this Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner, Thomas E. Ladner, and would show as follows:

STATEMENT OF JURISDICTION

Jurisdiction of this Court has been properly invoked by the Petitioner under 28 U.S.C.A. § 1254. This Response

is timely filed pursuant to Rule 13, United States Supreme Court Rules.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is involved in this case.

COUNTER STATEMENT OF THE CASE

A. Statement of the Facts

On the evening of December 25, 1987, Loyal Garner, Jr. was arrested by the Petitioner Thomas E. Ladner and Sabine County Sheriff's Deputy James "Bo" Hyden for Driving While Intoxicated. Two other individuals in the vehicle with Mr. Garner were also arrested for public intoxication. All three were taken to the Sabine County Jail in Hemphill, Texas and "booked-in" and placed in a cell together. Mr. Garner was totally cooperative with the arresting officers and neither he nor the other individuals were handcuffed by the officers. At some point after being placed in the cell in the Sabine County Jail, Mr. Garner began to hit on the door to try to get someone at the jail to allow him to make a telephone call to his wife in Louisiana. Until this incident, Mr. Garner had never been arrested.

The Petitioner, then Chief of Police of Hemphill, and Deputy Hyden went to the cell, opened the door, and asked who was beating on the door. When Mr. Garner

stood up and said "I am", the Petitioner then struck Mr. Garner in the head with a slapjack or "slapper", which is a leather device with a weighted object in the end.

After being struck in the head by the Petitioner with the slapjack or "slapper", Mr. Garner was taken out of the cell by the Petitioner and Deputy Hyden and moved to a "processing room" in the Sabine County Jail. In that "processing room" in the Sabine County Jail while in the custody of the Petitioner, Deputy Hyden, and another deputy, Bill Horton, Mr. Garner was repeatedly and viciously beaten on and about his head by these officers with a slapjack, nightstick, flashlight and fists.

As a result of the violent and vicious beating by the Petitioner and Deputies Hyden and Horton, Mr. Garner sustained serious bodily injuries including massive sub-dural and sub-arachnoid hematomas to his brain.

After administering the brutal beating and massive blows to the head of Mr. Garner, the Petitioner and Deputy Hyden returned Mr. Garner to his cell in a comatose, unconscious condition where they left him to die. The Petitioner at no time sought any aid for Mr. Garner, who remained in the cell with the other two individuals until the next morning with no medical attention.

The next morning a jailer found Mr. Garner unconscious and comatose from the severe beating to his head inflicted by the Petitioner and Deputies Horton and Hyden. An ambulance was called for the first time and Mr. Garner was taken to a local hospital where the massive sub-dural and sub-arachnoid brain injuries and his overall medical condition necessitated transferring him

from the local hospital in Hemphill to Medical Center Hospital in Tyler, Smith County, Texas, where a neurosurgeon performed surgery. The life of Mr. Garner could not be saved due to the intentional actions of the Petitioner and Deputies Hyden and Horton.

Loyal Garner, Jr. died in Medical Center Hospital in Tyler, Smith County, Texas, which is approximately 160 miles from Sabine County. A pathologist and neurosurgeon would later testify that the blows to Mr. Garner's head were intentionally inflicted with a force that could be compared to trying to hit a baseball over the center field fence or driving a golf ball off a tee down the fairway or having a high speed automobile head-on collision.

Under the applicable Texas statutes a murder prosecution can be brought in the county where the injuries are inflicted or in the county where the victim dies.

B. Course of Proceedings and Disposition in the Courts Below

On January 5, 1988, the Petitioner was indicted in Sabine County, Texas, for violating the civil rights of a prisoner. On July 15, 1988, a jury in Sabine County found the Petitioner and his confederates "not guilty". While the indictment and trial in Sabine County were pending, the Petitioner was indicted in Smith County on March 3, 1988, for the offense of murder. The Petitioner filed a pretrial writ of habeas corpus in the trial court in Smith County, claiming that the State was foreclosed from pursuing the murder prosecution due to the collateral estoppel doctrine of *Ashe v. Swenson*, 397 U.S. 436 (1970). The

trial court denied relief. On appeal to the Twelfth Court of Appeals of Texas in Tyler, Texas, the requested relief was granted. The Court of Criminal Appeals for the State of Texas granted the State's Petition for Discretionary Review and reversed the Court of Appeals. At that point, the trial in Smith County proceeded. The Petitioner then continued his appeal to the United States District Court for the Eastern District of Texas, which denied his petition. The Court of Appeals for the Fifth Circuit affirmed the federal district court's decision.

REASONS FOR DENYING THE WRIT

From the time that the Petitioner originally filed this Writ, his argument has changed subtly but substantively. The state courts of Texas did not review the argument which he now seeks to present to this Court. Further, the Court of Appeals for the Fifth Circuit faithfully adhered to this Court's holding in *Grady v. Corbin*, ___ U.S. ___, 110 S.Ct. 2084 (1990). Therefore, there is no reason to grant this Writ.

A. The Petitioner has not exhausted his state court remedies.

This appeal was initially filed as a pretrial writ of habeas corpus before the second trial. The basis of the claim was that the Petitioner would be subjected to double jeopardy because he had previously been tried for a civil rights violation arising out of the same incident. After the Court of Criminal Appeals reversed the Twelfth Court of Appeals for Texas, the Petitioner was tried for murder. As the State noted in its brief to the Fifth Circuit,

the posture and complexion of the Petitioner's argument has changed. Initially, the Petitioner claimed that being forced to stand trial for the murder charge would subject him to double jeopardy. *See Ladner v. State*, 790 S.W.2d 671 (Tex.App. – Tyler, 1988) (attached as Appendix "A"), and *Ladner v. State*, 780 S.W.2d 247 (Tex.Cr.App. 1989) (attached as Appendix "B"). The Petitioner has now apparently abandoned this claim, and argues that the presentation of specific evidence to the jury in the second trial violated the protection against double jeopardy. Because the second trial had not transpired at the time of the initial appellate review by the state courts, the state courts have not had the opportunity to compare the two records of the case, and to review this new claim.

In *Picard v. Connor*, 404 U.S. 270 (1971) and *Anderson v. Harless*, 459 U.S. 4 (1982), this Court made it clear that 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply controlling legal principles to the facts bearing upon his constitutional claim. *Picard, supra*, at 276-277; *Anderson, supra*, at 277.

The Petitioner has not made these arguments to the Texas courts, and is still free to present this argument to the Texas Court of Appeals in his direct appeal following his conviction in the second trial. In fact, the Petitioner has recently filed a brief in the state court of appeals making the same argument he seeks to present to this Court. Therefore, he has not exhausted his available state court remedies before seeking review by this Court as required by 28 U.S.C. § 2254. Unquestionably, his remedy lies in the state court.

B. The Court of Appeals correctly applied the test of *Grady v. Corbin*.

In *Grady v. Corbin*, ___ U.S. ___, 110 S.Ct. 2084 (1990), this Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which a defendant has already been prosecuted". *Grady* at 2087.

The Court of Appeals concluded that the Petitioner's murder prosecution in Smith County did not constitute double jeopardy under *Grady*, because the conduct that the State sought to prove to establish the elements of murder (the beating and death of Loyal Garner, Jr.) did not by itself constitute a violation of the Texas civil rights statute. The elements necessary to prove a civil rights violation also include a culpable mental state and a custody relationship between Loyal Garner, Jr. and the Petitioner. Neither of these elements was required to sustain the murder conviction, nor did the State allege these acts in its indictment. Thus, the Petitioner was not required to defend, a second time, against the factual predicate for a civil rights violation. Petitioner concedes this, but would add to *Grady* a second requirement: namely, that the Court examine the transcript of the second trial and determine whether, at any time during the murder trial, "a properly instructed jury could [have] return[ed] a verdict" for the civil rights violation. *Ladner v. Smith*, 941 F.2d 356, 368 (5th Cir. 1991) (Jolly, Circuit Judge, dissenting). As shown below, this position contradicts this Court's double jeopardy jurisprudence. Since this Court

has not adopted a "same transaction" test, the evidence adduced at trial in Sabine County is still admissible in the murder trial in Smith County.

Grady was written by a divided court and by its language it applies only to a very narrow set of circumstances. In fact, the dissent by Justice Scalia claims that the *Grady* case is a departure from the "clear text and clear precedent" of the constitutional protection against double jeopardy. *Grady, supra* at 2096 (Scalia, J., dissenting). This criticism should dissuade the Court from extending *Grady* beyond its narrow holding as the Petitioner advocates. The Double Jeopardy Clause guarantees only the right not to be put twice into jeopardy for the same offense and has historically permitted a prosecution based on the same acts but for a different crime. *Grady, supra.* Any meaningful application of double jeopardy should be capable of being applied to **prevent** the harm; i.e., a second trial. With the Petitioner's test, double jeopardy cannot be tested until after the second trial when an appellate court has a transcript in front of it.

The adoption of the Petitioner's position would also contradict this Court's repeated holding that the Double Jeopardy Clause does not require that the State bring all charges arising out of the same transaction or occurrence at the same time. Indeed, in *Grady* itself, the Court noted that it was not adopting the same transaction test.

> "Adoption of a 'same transaction' test would bar the homicide and assault prosecutions even if the State were able to establish the essential elements of those crimes without proving the conduct for which Corbin previously was convicted. The Court, however, has 'steadfastly

> refused to adopt the "single transaction" view of the Double Jeopardy Clause.' *Garrett v. United States*, 471 U.S. 773, 790, 105 S.Ct. 2407, 2417, 85 L.Ed.2d 764 (1985)."

Grady v. Corbin, Id. (additional citations omitted).

Thus, the Double Jeopardy Clause permits the introduction of the same evidence in a subsequent prosecution as long as the State did not have to prove the conduct of the former prosecution in order to establish an essential element of the subsequent offense. Under the Petitioner's theory, however, double jeopardy would attach whenever evidence that would constitute another offense was inadvertently or incidently presented to the jury. To avoid this possibility, the State would be forced to bring all of its charges at one time so that a conviction would not be vulnerable to a later claim of double jeopardy based on a defendant's creative reading of a transcript.

The Petitioner's position would ultimately require a different outcome in *Dowling v. United States*, 493 U.S. 342 (1990). In that case, the defendant was charged with robbing a bank while wearing a ski mask and carrying a small pistol. In proving the bank robbery charge, the government introduced testimony from one Henry, who stated that a similarly masked and armed Dowling had been one of two intruders who had entered her home two weeks after the bank robbery. Dowling had been acquitted of charges in the Henry case, but the government believed that Henry's description of him strengthened its identification of him as the bank robber and that her testimony linked him to another individual thought to be implicated in the bank robbery.

Dowling claimed that the evidence violated the collateral estoppel component of the Double Jeopardy Clause. This Court rejected Dowling's argument, noting that the Double Jeopardy Clause does not exclude in all circumstances relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted. *Dowling, supra,* at 348. *Dowling* is consistent with the Court of Appeals reading of *Grady,* because the conduct that the State sought to prove, that Dowling had entered Henry's home, did not itself constitute the crime of burglary for which Dowling had previously been prosecuted.[1] Under the Petitioner's theory, however, *Dowling* was wrongly decided, because the jury in that case might have concluded from the Henry testimony that Dowling had burglarized her home.

The Petitioner was charged with and acquitted of the offense of violation of the civil rights of a prisoner under two provisions of § 39.021 of the Texas Penal Code. The elements of that offense under § 39.021(a)(1) are:

(1) a peace officer

(2) intentionally

(3) subjects a person in his custody

(4) to bodily injury

(5) knowing his conduct is unlawful.

The elements of an offense under § 39.021(a)(2) of the Texas Penal Code are:

---

[1] In fact, Dowling admitted that he had entered Henry's home, but claimed that he did not intend to steal anything. *Dowling, supra.*

(1) a peace officer

(2) willfully denies or impedes a person in his custody

(3) in the exercise of enjoyment of any right, privilege, or immunity

(4) knowing his conduct is unlawful.

The essential elements of murder under § 19.02(a)(1) of the Texas Penal Code for which the Petitioner was charged in the Indictment are:

(1) a person

(2) intentionally or knowingly

(3) causes the death

(4) of an individual.

Braudrick v. State, 572 S.W.2d 709 (Tex.Cr.App. 1978). The essential elements of murder under § 19.02(a)(2) are:

(1) a person

(2) intends to cause serious bodily injury and

(3) commits an act clearly dangerous to human life

(4) causing the death of an individual.

Ussery v. State, 651 S.W.2d 767, 773 (Tex.Cr.App. 1983). None of these elements under either theory of murder requires proof of the offense for violation of civil rights of a prisoner.

If this Court extends *Grady* to the extent advocated by the Petitioner, the State would be foreclosed from many prosecutions. For example, if a defendant driving a

car strikes another car and kills the driver and occupants of the vehicle, the State would be allowed to pursue only one prosecution. Since the evidence involved in each case against the defendant for the death of the driver and passengers of the car would be the same, the State would be barred from prosecution for the other victims. This is not the law in Texas, nor is such a result required by *Grady*. As the Court of Criminal Appeals of Texas has held, the prosecution for multiple deaths from a single collision does not violate double jeopardy because each death is a "complete and distinct offense." *Ex Parte Rathmell*, 717 S.W.2d 33, 35 (Tex.Cr.App. 1986).

Grady applies only to a very narrow set of circumstances. This Court explicitly explained that it was not adopting a same transaction or same evidence test. In fact, this Court indubitably held that the same evidence might be used in a subsequent prosecution. In affirming the decision of the federal district court, the Court of Appeals heeded this Court's admonishment that it was not establishing either an "actual evidence" or "same evidence" test, nor a "same conduct" or "same transaction" test. Since the critical inquiry is what conduct the State would prove in the subsequent prosecution, and not the evidence, *Grady* does not bar the prosecution of the Appellant for murder in Smith County. The conduct of violation of civil rights of a prisoner does not need to be proven in order to establish an essential element of murder as alleged in Smith County. Obviously, the State must prove that a murder occurred in the Smith County charges. Although the death of the deceased may have been brought out in the Sabine County trial, it was not an element of the offense in that trial, and was not part of

the conduct required under the violation of civil rights of a prisoner.[2]

Regardless of whether the same evidence is to be presented, the same conduct does not need to be proved to convict the Appellant of murder in Smith County. Because *Grady* precludes a subsequent prosecution only if the conduct from the first trial must be proved to establish an essential element of the later prosecution, the State of Texas is not prohibited from trying the Appellant for murder in Smith County.

Although the Petitioner contends that there is some split in authority about the correct application of *Grady*, the alleged conflict in circuits is illusory. The Petitioner cites to no court which requires the comparison of the two transcripts[3]. The only conflict of authority is between the Petitioner's position and the precedents of this Court.

---

[2] The record from the Sabine County trial reflects that the conduct regarding the violation of the civil rights of a prisoner concerned the activity that occurred in the jail cell between the Appellant and the deceased. The record from the Smith County trial, however, reveals that the murder charge centered on the Appellant's actions toward the deceased in the processing, or "book-in", room of the jail, *after* the events that took place in the jail cell that were the main focus of the Sabine County trial.

[3] This Court has granted certiorari in the most recent case relied upon by the Petitioner. *United States v. Felix*, 926 F.2d 1522 (10th Cir. 1991), *cert. granted*, 112 S.Ct. 47 (1991).

CONCLUSION AND PRAYER

The Petitioner has failed to satisfy the requirements for review on certiorari and no extraordinary reason exists for the granting of the Writ by this Court. The Petitioner has not exhausted his state remedies. Further, the decisions below were correct and consistent with this Court's jurisprudence. The review of the Petitioner's double jeopardy claim was performed in conformity with the prior decisions of this Court. The Court of Appeals correctly held that *Grady v. Corbin* does not preclude the prosecution of the Petitioner for murder. There is no reason to review that decision. Accordingly, the Respondents respectfully submit that the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

/s/ Jack Skeen, Jr.
JACK SKEEN, JR.,
Criminal District Attorney
403 Smith County Courthouse
Tyler, Texas 75702
903/535-0520
State Bar Number 18455000

/s/ Amy R. Blalock
AMY R. BLALOCK,
Assistant Criminal District Attorney
403 Smith County Courthouse
Tyler, Texas 75702
903/535-0520
State Bar Number 02438900

Attorneys for Respondents

APPENDIX A

Thomas E. LADNER, Appellant,

v.

The STATE of Texas, Appellee.

Billy Ray HORTON, Appellant,

v.

The STATE of Texas, Appellee.

James M. HYDEN, Appellant,

v.

The STATE of Texas, Appellee.

No. 12-88-00193-CR to 12-88-00195-CR.

Court of Appeals of Texas, Tyler.

Aug. 31, 1988.

Jailers were indicted for the murder of a prisoner in the 241st District Court, Smith County, Joe Tunnell, J., and jailers filed writs of habeas corpus. The Court denied habeas corpus relief, and jailers appealed. The Court of Appeals, Colley, J., held that: (1) murder was not the "same offense" as violations of prisoner's civil rights, of which jailers had earlier been acquitted; (2) principles of collateral estoppel and double jeopardy barred prosecution of the murder indictments; and (3) jailers were not estopped to claim double jeopardy's protection.

Reversed.

John H. Seale, Seale, Stover, Coffield & Gatlin, Jasper, for Ladner.

Jeff Haas, Tyler, for Horton.

Paul Buchanan, Beaumont, for Hyden.

Jack Skeen, Jr., Dist. Atty., Tyler, for appellee.

COLLEY, Justice.

This is an appeal by Thomas E. Ladner, Billy Ray Horton, and James M. Hyden (hereinafter referred to collectively as "appellants") from the trial court's order denying habeas corpus relief sought by appellants on double jeopardy grounds. We reverse and grant the relief sought.

On January 5, 1988, appellants were separately indicted by a Sabine County Grand Jury for violations of the civil rights of Loyal Garner, Jr., under the provisions of Tex. Penal Code Ann. § 39.021(a)(1) and (2) (Vernon Supp. 1988) (hereinafter referred to as "section 39.021"). That section reads as follows:

> (a) A jailer or guard employed at a municipal or county jail, by the Texas Department of Corrections, or by a correctional facility authorized by Article 5115d, Revised Statutes, or Article 6166g-2, Revised Statutes, or a peace officer commits an offense if he:
>
> > (1) intentionally subjects a person in custody to bodily injury knowing his conduct is unlawful;
> >
> > (2) willfully denies or impedes a person in custody in the exercise or enjoyment of any right, privilege, or immunity knowing his conduct is unlawful.

The indictments in the Sabine cases were identical and read in pertinent part as follows:

> [T]hat [appellant], on or about the 25th day of December, A.D. 1987, and before the presentment of this indictment, in said County and State, did then and there as a peace officer, to-wit: Deputy Sheriff[1] of Sabine County, Texas, intentionally subject Loyal Garner, Jr., a person in custody, to bodily injury, to-wit: by hitting Loyal Garner, Jr. on his head and body with a slapstick and fists and causing Loyal Garner, Jr. to fall and strike his head against a wall and door; knowing his conduct was unlawful, and the death of Loyal Garner, Jr. occurred therefrom;. . . .[2]

A consolidated trial of the indictments was had before a jury in Sabine County. On July 15, 1988, the jury returned its verdict acquitting appellants on both counts of the indictments.

Meanwhile on March 3, 1988, appellants were separately indicted in Smith County for the murder of Loyal Garner, Jr., who died in Smith County.[3]

---

[1] Both Horton and Hyden were alleged to be deputy sheriffs of Sabine County, Texas, and Ladner was alleged to be Chief of Police of the city of Hemphill, Texas.

[2] A second count was alleged in each indictment, but that count is not pertinent here.

[3] *See* Tex. Code Crim.Proc.Ann. art. 13.07 (Vernon 1977), reading:

> If a person receives an injury in one county and dies in another by reason of such injury, the offender

(Continued on following page)

On July 16, 1988, each appellant filed an application for writ of habeas corpus in the Smith County District Court seeking dismissal of the murder indictment against him on the ground that his prosecution for murder was barred by the Double Jeopardy Clause of the Fifth Amendment and Tex. Const. art. I § 14. The trial court denied relief, and appellants seek that relief in this court on appeal.

Omitting the formal portions, the Smith County murder indictments against the appellants read as follows, to-wit:

> [T]hat on or about the 25th day of December, 1987, and anterior to the presentment of this Indictment, in the County and State aforesaid, [appellant] did then and there, intentionally and knowingly, cause the death of an individual, LOYAL GARNER, JR., by striking him about the head with a slapjack, and by striking him about the head with a night stick, and by striking him about the head with an object to the Grand Jury unknown;
>
> AND THE GRAND JURORS AFORESAID, upon their oaths aforesaid, do further present in and to said Court that on or about the 25th day of December, 1987, and anterior to the presentment of this Indictment, in the County and State aforesaid, [appellant] did then and there, intending to cause serious bodily injury to an

---

(Continued from previous page)

may be prosecuted in the county where the injury was received or where the death occurred, or in the county where the dead body is found.

> individual, to-wit: LOYAL GARNER, JR., intentionally and knowingly commit an act clearly dangerous to human life, to-wit: by striking the said LOYAL GARNER, JR., about the head with a slapjack, and by striking the said LOYAL GARNER, JR., about the head with a nightstick, and by striking the said LOYAL GARNER, JR., about the head with an object to the Grand Jury unknown, and thereby causing the death of LOYAL GARNER, JR.;. . . .

The first paragraph of each Smith County indictment charges an offense under Tex. Penal Code Ann. § 19.02(a)(1) (Vernon 1974). The second paragraph charges an offense under section 19.02(a)(2). The pertinent parts of section 19.02 read as follows, to wit:

> § 19.02 Murder
>
> (a) A person commits an offense if he:
>
> (1) intentionally or knowingly causes the death of an individual;
>
> (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual;. . . .

We now examine the constitutional law of double jeopardy as declared by the United States Supreme Court. In *Illinois v. Vitale*, 447 U.S. 410, 415, 416, 100 S.Ct. 2260, 2264, 2265, 65 L.Ed.2d 228 (1980), the Court stated: "The sole question before us is whether the offense of failing to reduce speed to avoid an accident is the 'same offense' for double jeopardy purposes as the manslaughter charges brought against Vitale." The Court noted that the rule developed for that analysis is provided by *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977);

Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and *Gavieres v. United States*, 220 U.S. 338, 31 S.Ct. 421, 55 L.Ed. 489 (1911), and may be stated as follows (quoting from *Blockburger* and *Brown*):

> [T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision [statute] requires proof of a fact which the other does not. 432 U.S. at 166, 97 S.Ct. at 2225.

Vitale, 447 U.S. at 416, 100 S.Ct. at 2265.

In *Vitale*, after observing that the Illinois Supreme Court failed to expressly state that proof of the manslaughter offense necessarily includes proof of a failure to reduce speed to avoid an accident or collision, the Court declined to hold that jeopardy barred the second prosecution (manslaughter), and stated that "[t]he mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution." *Id.* at 419, 100 S.Ct. at 2266.

On the other hand, the *Vitale* court stated that "[i]f, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown v. Ohio*." *Id.* at 419, 420, 100 S.Ct. at 2266, 2267. The clear implication of *Vitale* is that upon trial of the manslaughter offense, if the State does in fact

rely on the failure to reduce speed to establish the manslaughter offense, then any conviction therefore would be void under the jeopardy rule.

Here, the first question before this court is whether the alleged civil rights offense is the "same offense" as the murder charges brought against the appellants. *Vitale*, 447 U.S. at 415-416, 100 S.Ct. at 2264-65. To determine that question, we must apply the *Blockburger* test.

In applying the test we must look at and compare the proof necessary to prove the statutory elements of murder under section 19.02(a)(1) and section 19.02(a)(2) with the elements of violation of civil rights under section 39.02(a)(1) rather than the evidence actually produced at the trial of the civil rights prosecution. However, *Vitale* also directs that we must analyze the penal statutes by focusing on the respective indictments. *Vitale*, 447 U.S. at 411-13, 100 S.Ct. at 2262-63.

In this case, the first count of the indictments against appellants in the civil rights case alleged that each appellant was a peace officer who intentionally subjected Garner, a prisoner in jail, to bodily injury by striking him "on his head and body with a slapstick and fists and [caused Garner] to fall and strike his head against a wall and door; knowing his conduct was unlawful, and the death of [Garner] occurred therefrom;. . . . "

The first paragraph of the murder indictments charges that the appellants "intentionally and knowingly" caused the death of Garner. That requirement is not present in the civil rights indictments. The second paragraph of the murder indictments charges that the appellants, "intending to cause *serious* bodily injury"

(emphasis added) to Garner, struck him with a "slapjack" and a "nightstick" "thereby causing" his death. That requirement is not present in the civil rights indictments.

The first count in the civil rights indictments required the State to prove that the appellants were peace officers, and that Garner was "a person in custody" at the time of the injuries. These requirements of proof are not present in the murder indictments. The first count in the civil rights indictments also requires proof that the blows struck by appellants to Garner's head and body caused Garner "to fall and strike his head against a wall and door." Such proof is not required by the murder indictments. The civil rights indictments require proof that the appellants knew their conduct was unlawful at the time the blows were struck against Garner. That proof is not required by the murder indictments.

Thus, we conclude, under *Blockburger*, *Vitale*, and *May v. State*, 726 S.W.2d 573 (Tex.Cr.App.1987), that murder as alleged in the Smith County indictments is not "the same offense" as the violations of civil rights alleged in the first count of the Sabine County indictments.

Appellants also contend that their prosecution for the murder of Garner is barred by the application of the doctrine of collateral estoppel which the Court in *Ashe v. Swenson*, 397 U.S. 436, 442-446, 90 S.Ct. 1189, 1193-95, 25 L.Ed.2d 469 (1970), declared to be embodied in the Fifth Amendment guaranty of double jeopardy.

In *Ashe*, the Court defined "collateral estoppel" in the following language:

> It means simply that when a [sic] issue of ultimate fact has once been determined by a valid

> and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id. at 443, 90 S.Ct. at 1194. The Court also stated "that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Id.* at 444, 90 S.Ct. at 1194. The Court explained that:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. United States*, 332 U.S. 575, 579, 68 S.Ct. 237, 240 [92 L.Ed. 180 (1948)]. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.

Id. at 444, 90 S.Ct. at 1194.

The *Ashe* Court cited with approval a quotation from Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 Harv.L.Rev. 1, 38-39, reading in part:

> If a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering.

Ashe, 397 U.S. at 444 n. 9, 90 S.Ct. at 1194, n. 9.

The record before the trial court and this court consists of transcripts in each case, containing, inter alia, each appellant's application for the writ, copies of the Sabine County and Smith County indictments, the Court's charge,[4] the jury verdict, and a statement of facts of the habeas corpus hearing conducted in Smith County on July 16, 1988.

The record reveals that the alleged beating of Garner in the Sabine County Jail constitutes the basis for the murder prosecutions. The State concedes that a "majority" of the witnesses who testified in the Sabine County cases will be called by the State to give testimony concerning "the same events, occurrences, circumstances" that such witnesses testified to in the Sabine County prosecutions. It is also undisputed that the court signed judgments of acquittal in the Sabine County cases.

Paul Buchanan, counsel for appellant Hyden, testified there was no dispute at the trial of the Sabine County cases that each appellant was a peace officer and Garner a person in custody at the time of the alleged commission of the civil rights offense, stating "[t]he primary issue

---

[4] Under the charge, the criminal responsibility of Hyden and Horton was predicated on Ladner's conduct pursuant to Tex.Penal Code Ann. § 7.02(a)(3) (Vernon 1974).

being the hitting of [Garner] with a slapstick and especially the fact that his death was caused therefrom." Buchanan also testified that there was "no issue as to the fact that [Garner] had died but there was a significant issue as to the cause of death." On cross-examination Buchanan candidly admitted he could not testify as to "what the basis of the jury's verdict [was]." He further testified that the allegations that Ladner struck the blows "knowing his conduct was unlawful" was disputed. Buchanan also testified without dispute that each appellant testified in his own behalf in the Sabine County prosecutions, and that each admitted that he was a peace officer on the date of the alleged offense.

John Hannah, who acted as special prosecutor of the Sabine County indictments, testified at the habeas corpus hearing. Hannah stated that no "serious issue" was presented to the Sabine County jury as to whether appellants were "peace officers." Hannah, when asked whether he and defense counsel "agreed [that Garner] . . . was in fact a prisoner," stated that although that issue was submitted to the jury, "I don't think that the defense attempted to make that an issue."

Taking a reasonable and realistic view of the record before us, we conclude that the State in prosecution of the murder indictments must necessarily prove by the same witnesses who testified during the Sabine County prosecutions, that Ladner intentionally struck Garner thereby causing Garner's death. In addition, we deem it reasonable to conclude that each appellant will testify in his own defense in the murder prosecutions in Smith County. Furthermore, based on the record made at the habeas hearing, we are persuaded that upon trial of the civil

rights action it was undisputed that appellants were peace officers and that the deceased was a prisoner at the time of the alleged attack on him. Eliminating these issues from our consideration, we are left with the following disputed fact issues[5] before the jury:

> [I]f you find from the evidence beyond a reasonable doubt that on or about the 25th day of December, 1987, in Sabine County, Texas, the defendant, Thomas Ladner . . . intentionally subjected [Garner] . . . to bodily injury, to-wit: By striking him on the head with a slapstick, knowing his conduct was unlawful, and that the death of [Garner] occurred therefrom, and that the use of force was not justified by the instructions heretofore given in this charge, then you will find the defendant [Ladner] . . . guilty of the charge of violations of civil rights of [Garner] . . . , as alleged in Count One of the Indictment.

The instructions referred to in the above-quoted paragraph of the charge relate to the justification defense provided by Tex. Penal Code Ann. § 9.53 (Vernon Supp. 1988) (hereinafter referred to as "section 9.53")[6] and read as follows:

---

[5] As submitted by the court's charge respecting the first count of the civil rights indictment.

[6] Section 9.53 reads:

> A peace officer, jailer, or guard employed at a municipal or county jail, or a guard or correctional officer employed by the Texas Department of Corrections is justified in using force against a person in custody

(Continued on following page)

> You are instructed that our law provides that a peace officer, jailer, or guard employed at a municipal or county jail, is justified in using force against a person in custody when and to the degree the peace officer, jailer, guard or correctional officer reasonably believes the force is necessary to maintain the security of the penal institution, the safety or security of other persons in custody, or employed by the penal institution, or his own safety or security.
>
> Now, if you find from the evidence, or have a reasonable doubt thereof, that Thomas Ladner, as a peace officer or guard employed at a municipal or county jail, used such force against Loyal Garner, Jr. while he was in custody when and to the degree the peace officer, Thomas Ladner, reasonably believed that force was necessary to maintain the security of the penal institution, the safety or security of other persons in custody or employed by the penal institution, or his own safety or security, you will say not guilty by your verdict.

Thus under the record, the jury's acquittal is obviously grounded on one or more of the following disputed fact issues: whether (1) Ladner intentionally struck Garner, (2) knowing his conduct was unlawful, (3) Garner died as a result of the injuries; and (4) whether Ladner's

---

(Continued from previous page)

when and to the degree the peace officer, jailer, guard, or correctional officer reasonably believes the force is necessary to maintain the security of the penal institution, the safety or security of other persons in custody or employed by the penal institution, or his own safety or security.

conduct was justified under section 9.53. Each of these issues, other than the issue of whether Ladner knew his conduct in striking Garner, if he did, was unlawful, must be established or disproved by the State beyond a reasonable doubt in order to convict the appellants of murder as alleged in the Smith County indictments.

The question of whether Ladner acted "knowing his conduct was unlawful" is pivotal because that issue was submitted to the Sabine County jury as an essential element of the civil rights offense. And it is the only disputed fact issue submitted in those cases that is not an essential element of murder as alleged in the Smith County indictments.

The jury was not given the statutory definition[7] of "unlawful," so we must assume that the jury in its deliberations utilized the meaning commonly ascribed to the word, viz., "not lawful: contrary to or prohibited by law: not authorized or justified by law: . . . disobeying or disregarding the law. . . . " WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2502 (1976). The definition of the word is essentially the same in BLACK'S LAW DICTIONARY 1377 (5th ed. 1979); however, BLACK adds that the word unlawful, "[w]hile necessarily not implying the element of *criminality*, . . . is broad enough to include it." (Emphasis ours.) Consequently, a realistic examination of the record, however meager and incomplete,

---

[7] Tex.Penal Code Ann. § 1.07(36) (Vernon 1974) provides:

> "Unlawful" means criminal or tortious or both and includes what would be criminal or tortious but for a defense not amounting to justification or privilege.

employing as we must, reason and common sense, persuades us that reasonable lay jurors could not have predicated their acquittal in the civil rights prosecutions solely on the disputed factual issue of whether Ladner struck the blows against Garner "knowing his conduct was unlawful," given the profusion of instructions set forth in the charge respecting the justification defense.[8]

With that analysis, three disputed issues remain for consideration. They are: (1) Did Ladner intentionally strike the alleged blows against Garner; (2) Did those blows result in the death of Garner; and if so, (3) Was Ladner's conduct justified under section 9.53. It is

---

[8] It is noteworthy that section 39.021 was first enacted by the 66th Legislature in 1979. (Act of June 13, 1979, ch. 618, § 1, 1979 Tex.Gen.Laws 1383). Subsection (a)(1) then read in part:

> A peace officer . . . commits an offense if he: intentionally subjects a person in his custody to bodily injury *knowing his conduct is unlawful.* (Emphasis ours.)

Although the section was later amended twice, in 1983, and again in 1987, no substantial change was made to the language under consideration. In the other hand, section 9.53 was *first* enacted in 1987. (Act of June 17, 1987, ch. 512, § 1, 1987 Tex.Gen.Laws 2124.) It appears that the legislature, in the absence of a justification defense specifically applicable to the conduct proscribed by the 1979 version of section 39.021(a)(1), intended to criminalize assaultive conduct of a peace officer, jailer or guard in penal institutions towards a prisoner only when the officer's conduct was not justified under the facts and circumstances surrounding the conduct. Thus the term "knowing his conduct is unlawful" was inserted in the definition of the offense in 1979 in order to provide a justification defense not then separately provided. The enactment of section 9.53 appears to render the term vestigial and unnecessary.

obvious that the State must necessarily relitigate[9] all of these issues in order to convict appellants of murder under either paragraph set forth in the Smith County indictments. The doctrine of collateral estoppel prohibits the State from so doing, and that ingredient of double jeopardy protection prohibits prosecution of the Smith County indictments against the appellants. *Ashe v. Swenson*, 397 U.S. at 443-446, 90 S.Ct. at 1194-95.

Our opinion sufficiently answers the State's arguments in the case other than its arguments that (1) the legislature has authority, and is not precluded by the Fifth and Fourteenth Amendments from "[splitting] a single transaction into separate crimes . . . [and providing] multiple punishments;" (2) section 39.021(c) authorizes dual prosecutions for the same conduct, and that jeopardy's protection under the Fifth and Fourteenth Amendments does not affect such legislative authority; and (3) appellants are estopped to claim jeopardy's protection because they "instigated or procured the first proceeding with the intent to preclude the full consequences of [their] criminal conduct."

We reject the State's arguments one and two because it is clear that while the legislature may be free to create and define offenses as it chooses, the prosecutors and the courts are not free to prosecute and convict an accused

---

[9] Precisely, the State in order to discharge its burden of proof must prove the first two elements beyond a reasonable doubt, and disprove the justification defense beyond a reasonable doubt. *See* Tex.Penal Code Ann. §§ 2.01 and 2.03(a)(d) (Vernon 1974).

contrary to jeopardy's first guarantee.[10] *Brown v. Ohio*, 432 U.S. at 165, 97 S.Ct. at 2225; *Ashe v. Swenson*, 397 U.S. at 445-446, 90 S.Ct. at 1195. It must be understood that this case is not one "[w]here consecutive sentences are imposed *at a single criminal trial* [and in which] the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." (Citations omitted.) *Brown v. Ohio*, 432 U.S. at 165, 97 S.Ct. at 2225. (Emphasis ours.)

The State's argument three is untenable for the reason that the record does not support it. There is no fraud or collusion shown between appellants and their accusers as contemplated by *Benard v. State*, 481 S.W.2d 427, 430 (Tex.Cr.App. 1972), and illustrated by the holding in *Richardson v. State*, 109 Tex.Crim.R. 403, 5 S.W.2d 141 (1928).

For the reasons stated, the judgment in trial court cause numbers 1-88-152, 1-88-153, and 1-88-154 on the docket of the 241st Judicial District Court of Smith County, Texas, are reversed and the indictments in those cases are dismissed, and it is so ORDERED.

---

[10] Which protects against a second prosecution for the same offense after acquittal. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).

APPENDIX B

Thomas E. LADNER, Appellant,

v.

The STATE of Texas, Appellee.

Billy Ray HORTON, Appellant,

v.

The STATE of Texas, Appellee.

James M. HYDEN, Appellant,

v.

The STATE of Texas, Appellee.

Nos. 1004-88 to 1006-88.

Court of Criminal Appeals of Texas,
En Banc.

Oct. 25, 1989.

Defendants filed pretrial writ of habeas corpus claiming that prosecution on murder charges was barred by acquittal on civil rights charges. The 241st Judicial District Court, Smith County, Joe Tunnell, J., denied relief. The Court of Appeals, granted relief. After granting the State's petition for discretionary review, the Court of Criminal Appeals, Duncan, J., held that prosecutions were not barred by double jeopardy.

Judgment of Court of Appeals reversed and cause remanded.

Clinton, J., concurred in the result.

Miller, J., filed a concurring note.

Teague, J., dissented.

John Seale, Jasper, for Ladner.

Paul N. Buchanan, Beaumont, Jeff L. Haas, Tyler, for Horton and Hyden.

Jack Skeen, Jr., Dist. Atty., and Christian E. Bryan, Asst. Dist. Atty., Tyler, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON STATE'S PETITIONS FOR DISCRETIONARY REVIEW

DUNCAN, Judge.

On January 5, 1988, in Cause Nos. 5043, 5044 and 5045 in Sabine County Texas, Thomas E. Ladner, Billy Ray Horton, and James M. Hyden (hereinafter referred to as appellants), were separately indicted for the offense of Violating the Civil Rights of a Prisoner, charged pursuant to V.T.C.A. Penal Code § 39.021.[1] On July 15, 1988, a jury

---

[1] V.T.C.A. Penal Code, § 39.021, in pertinent part states:

> (a) A jailer or guard employed at a municipal or county jail, by the Texas Department of Corrections, or by a correctional facility authorized by Article 5115d, Revised Statutes, or Article 6166g-2, Revised Statutes, or a peace officer commits an offense if he:
>
> (1) intentionally subjects a person in custody to bodily injury knowing his conduct is unlawful.

In addition the relevant count to the Sabine County indictment reads:

> [T]hat [named appellant], on or about the 25th day of December, A.D. 1987, and before the presentment of this indictment, in said County and State,

(Continued on following page)

in Sabine County found the appellants "not guilty." While these indictments were pending, on March 3, 1988, in Smith County, Texas, the appellants were separately indicted for the offense of murder in Cause Nos. 12-88-00193-CR, 12-88-00194-CR and 12-88-00195-CR presently pending in the 241st Judicial District Court. The Smith County and Sabine County indictments arose from an incident involving the death of Loyal Garner, Jr., which occurred on December 25, 1987.

Following their acquittal in Sabine County, the appellants filed a pretrial writ of habeas corpus in the 241st Judicial District Court of Smith County, Texas, claiming *inter alia*, that the State was foreclosed from pursuing the murder prosecution due to the doctrine of collateral estoppel, which is embodied within the double jeopardy guarantee of the Fifth Amendment to the United States Constitution and " . . . bars relitigation between the same parties of the issues actually determined at a previous trial." *Ashe v. Swenson*, 397 U.S. 436, 442, 90 S.Ct. 1189,

---

(Continued from previous page)

> did then and there as a peace officer, to-wit: [Deputy Sheriff of Sabine County, Texas], intentionally subject Loyal Garner, Jr., a person in custody, to bodily injury, to-wit: by hitting Loyal Garner, Jr., on his head and body with a slapstick and fists and causing Loyal Garner, Jr. to fall and strike his head against a wall and door; knowing his conduct was unlawful, and the death of Loyal Garner, Jr. occurred therefrom; . . . .

As observed by the court of appeals in fn.1 of their opinion, both Horton and Hyden were alleged to be Deputy Sheriffs of Sabine County, Texas, while Ladner was alleged to be the Chief of Police of the City of Hemphill, Texas.

1193, 25 L.Ed.2d 469 (1970). The trial court denied relief. However, on appeal to the Twelfth Court of Appeals the requested relief was granted. *See Ladner, et al. v. State* (Ct.App. – Tyler, No. 12-88-00193-CR, delivered August 31, 1988). We granted the State's petition for discretionary review to examine the correctness of the court of appeals' application of the collateral estoppel doctrine.

Dispensing with a preliminary claim, the court of appeals, after applying the appropriate legal standard as required by the United States Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), correctly concluded that the murder offense, as alleged in the Smith County indictments, was not "the same offense" as the civil rights offense, as alleged in the first count of the Sabine County indictments. Therefore, the murder prosecution was not barred by the "same offense" theorem implicit in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.[2]

---

[2] The "same offense" rationale of double jeopardy may be stated as follows:

> [T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision [statute] requires proof of a fact which the other does not.

Brown v. Ohio, 432 U.S. 161, 166, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977).

The more troublesome issue confronting the court of appeals, and the issue we granted review to consider, is the applicability of the collateral estoppel doctrine. Embodied with the constitutional protection that a criminal defendant cannot be twice placed in jeopardy for the same crime is the doctrine of collateral estoppel, which the Supreme Court in *Ashe v. Swenson*, supra, defined as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

Id., 397 U.S. at 443, 90 S.Ct. at 1194.

Quoting *Ashe v. Swenson*, supra, the court of appeals stated that in order to make this determination the following approach is necessary:

> 'Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." The inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Sealfon v. United States*, 332 U.S. 575, 579 [68 S.Ct. 237, 239, 92 L.Ed. 180 (1948)]. . . . Any test more technically restrictive would of course, simply amount to a

> rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal.'

Id. at Slip op., pp. 7-8.

In applying the elusive standard enunciated by the Supreme Court, the court of appeals observed that the transcripts of each appellant contained *inter alia,* the respective applications for the writ, copies of the Sabine and Smith Counties indictments, the trial court's charge, the jury verdict, and a transcription of the statement of facts taken at the habeas corpus hearing held in Smith County on July 16, 1988. Conspicuously, but understandably[3] lacking from the record on appeal was the statement of facts concerning the trial on the merits of the violation of the civil rights of a prisoner tried in Sabine County. From this record, however, the court of appeals stated it was able to ascertain:

> The record reveals that the alleged beating of Garner in the Sabine County Jail constitutes the basis for the murder prosecutions. The State concedes that a "majority" of the witnesses who testified in the Sabine County cases will be called by the State to give testimony concerning "the same events, occurrences, circumstances" that such witnesses testified to in the Sabine County prosecutions. It is also undisputed that the court signed judgments of acquittal in the Sabine County cases.

---

[3] The hearing on the appellants' application for writ of habeas corpus was held one day after their acquittal in Sabine County.

> Paul Buchanan, counsel for appellant Hyden, testified there was no dispute at the trial of the Sabine County cases that each appellant was a peace officer and Garner a person in custody at the time of the alleged commission of the civil rights offense, stating "[t]he primary issue being the hitting of [Garner] with a slapstick and especially the fact that his death was caused therefrom." Buchanan also testified that there was "no issue as to the fact that [Garner] had died but there was a significant issue as to the cause of death." On cross-examination Buchanan candidly admitted he could not testify as to "what the basis of the jury's verdict [was]." He further testified that the allegations that Ladner struck the blows "knowing his conduct was unlawful" was disputed. Buchanan also testified without dispute that each appellant testified in his own behalf in the Sabine County prosecutions, and that each admitted that he was a peace officer on the date of the alleged offense.
>
> John Hannah, who acted as special prosecutor of Sabine County indictments, testified at the habeas corpus hearing. Hannah stated that no "serious issue" was presented to the Sabine County jury as whether appellants were "peace officers." Hannah, when asked whether he and defense counsel "agreed [that Garner] . . . was in fact a prisoner," stated that although that issue was submitted to the jury, "I don't think that the defense attempted to make that an issue."

Id. at Slip op., p. 7-8.

The court of appeals, after considering the evidence from the writ hearing, the charge submitted to the jury in

the Sabine County trial, and the respective indictments, formulated the following conclusions:

> (1) At the trial of the civil rights violation it was undisputed that appellants were peace officers and that the deceased was a prisoner at the time of the alleged attack on him;
>
> (2) The jury's acquittal must have been grounded on one or more of the following disputed fact issues: whether (a) Ladner intentionally struck Garner, (2) knowing his conduct was unlawful, (3) Garner died as a result of the injuries, and (4) whether Ladner's conduct was justified under V.T.C.A. Penal Code, § 9.53 (Maintaining Security in Penal Institutions).
>
> (3) Each of the aforementioned issues, with the exception that Ladner [as well as the other appellants] knew his conduct was unlawful, had to be established or disproved by the State beyond a reasonable doubt in the Smith County prosecution.
>
> (4) The question of whether Ladner acted "knowing his conduct was unlawful" was submitted to the Sabine County jury as an essential element of the civil rights offense. And, according to the court of appeals, was the only fact issue submitted in those cases that is not an essential element of the murder prosecution pending in Smith County.
>
> (5) Reasonable lay jurors could not have predicated their acquittal in the civil rights prosecution solely on the disputed factual issue of whether Ladner struck the blows against Garner "knowing his conduct was unlawful," given the

profusion of instructions set forth in the charge respecting the justification defense.[4]

Consequently, in light of those observations the court of appeals, in holding that collateral estoppel barred the murder prosecution, opined:

> With that analysis, three disputed issues remain for consideration. They are: (1) Did Ladner intentionally strike the alleged blows against Garner; (2) Did those blows result in the death of Garner; and if so, (3) Was Ladner's conduct justified under section 9.53. It is obvious that the State must necessarily relitigate all of these issues in order to convict appellants of murder under either paragraph set forth in the Smith County indictments. The doctrine of collateral estoppel prohibits the State from so doing, and that ingredient of double jeopardy prohibits prosecution of the Smith County indictments against the appellants. *Ashe v. Swenson*, 397 U.S. at 443-446 [90 S.Ct. at 1194-1196]. [Footnotes omitted]

> Our opinion sufficiently answers the State's arguments in this case other than its arguments that (1) the legislature has authority, and is not

---

[4] V.T.C.A. Penal Code, § 9.53, states as follows:

> A peace officer, jailer, or guard employed at a municipal or county jail, or a guard or correctional officer employed by the Texas Department of Corrections is justified in using force against a person in custody when and to the degree the peace officer, jailer, guard or correctional officer reasonably believes the force is necessary to maintain the security of the penal institution, the safety or security of other persons in custody or employed by the penal institutions, or his own safety.

precluded by the Fifth and Fourteenth Amendments from "[splitting] a single transaction into separate crimes . . . [and providing] multiple punishments;" (2) section 39.21(c) authorizes dual prosecutions for the same conduct, and that jeopardy's protection under the Fifth and Fourteenth Amendment does not affect such legislative authority; and (3) appellants are estopped to claim jeopardy's protection because the "instigated or procured the first proceeding with the intent to preclude the full consequences of [their] criminal conduct."

We reject the State's argument one and two because it is clear that while the legislature may be free to create and define offenses as it chooses, the prosecutors and the courts are not free to prosecute and convict an accused contrary to jeopardy's first guarantee. *Brown v. Ohio,* 432 U.S. at 165 [97 S.Ct. at 2225]; *Ashe v. Swenson* 397 U.S. at 445-446 [90 S.Ct. at 1195-1196]. It must be understood that this case is not one "[w]here consecutive sentences are imposed *at a single criminal trial* [and in which] the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." (Citations omitted) *Brown v. Ohio,* 432 U.S. at 165 [97 S.Ct. at 2225]. (Emphasis ours) [footnotes omitted]

Id. at Slip op., p. 12-13.

In essence, the court of appeals in concluding that the doctrine of collateral estoppel barred the Smith County murder prosecutions, found that three elements were essential to the violation of a prisoner's civil rights

offense which are not required in a prosecution for murder to-wit: (1) that at the time of the offense the defendant was a peace officer; (2) the victim was in the defendant's custody at the time of the criminal violation; and (3) knew that their conduct was unlawful. In rejecting the notion that the Sabine County jury acquitted the appellants on any one of the above issues the court of appeals resolved that the jury could not have grounded its acquittal on the issues of whether the appellants were peace officers or whether the victim was in custody of the appellants at the time of the Sabine County offense because the testimony adduced at the hearing on the writ of habeas corpus indicated to the contrary. Specifically, because Paul Buchanan, counsel for appellant Hyden testified that there was no dispute as to whether each appellant was a peace officer or that victim Garner was in the custody of the appellants at the time of the alleged commission of the civil rights offense. In addition, according to the court of appeals, this testimony was buttressed by that of special prosecutor John Hanna.

As to the element that each appellant "knew that his conduct was unlawful" at the time of the commission of the civil rights violation, the court of appeals concluded that the Sabine County jury could not have grounded its acquittal on that disputed issue on what we consider a wholly novel theory:

> The jury was not given the statutory definition [footnote omitted] of 'unlawful,' so we must assume that the jury in its deliberations utilized the meaning commonly ascribed to the word, viz., 'not lawful: contrary to or prohibited by law: not authorized or justified by law: . . .

> disobeying or disregarding the law. . . . ' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2502 (1976). The definition of the word is essentially the same in BLACK'S LAW DICTIONARY 1377 (5th ed.1979); however, BLACK adds that the word unlawful, [w]hile necessarily not implying the element of *criminality*, . . . is broad enough to include it." (Emphasis ours.) Consequently, a realistic examination of the record, however meager and incomplete, employing as we must, reason and common sense, persuades us that reasonable lay jurors could not have predicated their acquittal in the civil rights prosecutions solely on the disputed factual issue of whether Ladner struck the blows against Garner 'knowing his conduct was unlawful,' given the profusion of the instructions set forth in the charge respecting the justification defense.

Id. at Slip op., p. 10-11.

The court of appeals then explained in fn. 8 that in respect to § 39.021 of the penal code that:

> It is noteworthy that section 39.021 was first enacted by the 66th Legislature in 1979. (Act of June 13, 1979, ch. 618, § 1, 1979 Tex.Gen.Laws 1383). Subsection (a)(1) then read in part:
>
> A peace officer . . . commits an offense if he: intentionally subjects a person in his custody to bodily injury *knowing his conduct is unlawful.* (emphasis ours.)
>
> Although the section was later amended twice, in 1983, and again in 1987, no substantial change was made to the language under consideration. On the other hand, section 9.53 was *first* enacted in 1987. (Act of June 17, 1987, ch. 512,

> § 1, 1987 Tex.Gen.Laws 2124.) It appears that the legislature, in the absence of a justification defense specifically applicable to the conduct proscribed by the 1979 version of section 39.021(a)(1), intended to criminalize assaultive conduct of a peace officer, jailer or guard in penal institutions towards a prisoner only when the officer's conduct was not justified under the facts and circumstances surrounding the conduct. Thus the term "knowing his conduct is unlawful" was inserted in the definition of the offense in 1979 in order to provide a justification defense not then separately provided. The enactment of section 9.53 appears to render the term vestigial and unnecessary.

Id. at Slip op., p. 11-12.

By its interpretation we can only conclude that the court of appeals has held that the element of § 39.021, supra, requiring the peace officer actor know that his conduct was unlawful at the time he perpetrated the offense, was rendered superfluous by the legislative enactment of § 9.53, supra. For reasons to be stated later, we cannot agree with this conclusion nor with the ultimate result reached by the court of appeals.

In order to fully comprehend the evanescent doctrine of collateral estoppel, we look for guidance to the interpretations of *Ashe* in the Fifth Circuit. As in *Dedrick v. State*, 623 S.W.2d 332, 336 (Tex.Cr.App.1981), we observe that a clear statement of the principles involved was made in *United States v. Mock*, 604 F.2d 341 (5th Cir.1979):

> In principle, the law of collateral estoppel is clear; in application, it can be a slippery concept indeed. According to *Ashe v. Swenson*, 397 U.S.

436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* [at] 443, 90 S.Ct. at 1194. Thus, *Ashe* mandates two inquiries: First, what facts were necessarily determined in the first law suit? See *United States v. Ballard*, 586 F.2d 1060 (5th Cir.1978); *Adams v. United States*, 287 F.2d 701 (5th Cir.1961). Second, has the government in a subsequent trial tried to relitigate facts necessarily established against it in the first trial? Facts so established in the first trial may not be used in the second trial either as ultimate or as evidentiary facts. *Blackburn v. Cross*, 510 F.2d 1014 (5th Cir.1975); *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir.1972). Thus, while the parent doctrine of double jeopardy bars a subsequent prosecution based on a different section of the criminal code when "the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other," its progeny, collateral estoppel, bars only the reintroduction or relitigation of facts already established against the government. To state the distinction in more prosaic terms, the traditional bar of double jeopardy prohibits the prosecution of the crime itself, whereas collateral estoppel, in a more modest fashion, simply forbids the government from relitigating certain facts in order to establish the fact of the crime. See *United States v. Kramer*, 289 F.2d 909 (2d Cir.1961) (Friendly, J.). [Footnotes omitted]

Id. at 343.

Most importantly, the concept of collateral estoppel has proven to be narrower in scope as might have originally been gleaned from the literal language of *Ashe*. In particular, the question is not whether there is a possibility that an ultimate fact was determined adverse to the government, but whether after examining the pleadings, evidence, jury charge and other relevant material in the record of the first trial a "rational jury" *necessarily* grounded its verdict upon an issue which the defendant seeks to foreclose from relitigation. Thus, as recognized in *United States v. Gonzales*, 548 F.2d 1185 (5th Cir.1977):

> . . . *Adams v. United States*, 287 F.2d 701 (5th Cir.1961), supra, restated the proposition to the effect that when a "fact is not *necessarily* determined in the former trial, the possibility that it may have been does not prevent re-examination of that issue. [citations omitted]

Id. at 1191.

Contrary to the court of appeals' conclusion, we are of the opinion that a fact issue not crucial to the Smith County murder prosecution may have been the foundation of the Sabine County jury's acquittal; thus, an ultimate fact essential to the murder trial was not "necessarily determined." As previously noted, the court of appeals determined that the three essential elements unique to the civil rights violation could not have been the basis of the Sabine County acquittal. Again, these three elements consist of: (1) that at the time of the incident the appellants were peace officers; (2) that the victim, Loyal Garner, Jr., was in the appellants' custody; and (3) the individual appellant knew his conduct was unlawful at the time of the commission of the offense. As

to the first two elements, the court of appeals simply disposed of the issue by relying totally on the testimony presented by the defense at the hearing on the writ of habeas corpus that these elements were in fact uncontested by the defense in the Sabine County trial. While this method of resolving the issue is indeed simple, convenient, and seemingly persuasive, it is incorrect. Put simply, it ignores the dictates of *Ashe v. Swenson*, supra, and its progeny that where a general verdict acquitting a defendant was rendered by the jury it is essential that the appellate court "examine the record of the prior proceedings, taking into account the pleadings, evidence, charge, and other relevant matter . . . " *id.*, to determine whether a rational jury necessarily grounded the acquittal in the former trial on ultimate fact issues identical to some or all of those in the subsequent proceeding. Paying mere lip service to this constitutional standard is insufficient. While indeed any argument that the jury in the Sabine County trial may have doubted that the appellants were peace officers or that Garner was in their custody may be implausible and in actuality without a factual foundation, relying on the writ testimony of the appellants' attorneys supplied an inadequate basis for the court of appeals' decision. Cf. *Johnson v. Estelle*, 506 F.2d 347 (5th Cir.1975), *cert. denied*, 422 U.S. 1024, 95 S.Ct. 2619, 45 L.Ed.2d 682 (1975). Courts should not decide the proper application of the doctrine of collateral estoppel solely on the basis of the self-serving declarations and opinions of counsel. Cf. *McCrory v. State*, 643 S.W.2d 725, 733 (Tex.Cr.App.1983).

Notwithstanding that the court of appeals failed to consider the criteria mandated by the Supreme Court, we need not decide whether the right result was reached on

this basis alone. Rather, we find also that the court of appeals was incorrect in concluding that the jury in the first trial could not have grounded its acquittal on the element that appellants did or did not know their conduct was unlawful.

As previously observed, the court of appeals concluded that § 9.53, supra, had rendered that element of § 39.021(a)(1), (2), which requires the prosecution to prove a defendant knew "his conduct to be unlawful" a nullity. That may or may not be a valid conclusion; however, it is unnecessary for us to resolve that issue. Section 39.021(a)(1)(2), supra, specifically makes such knowledge an element of the offense. The jury charge in this case submitted it as an element; thus, it was necessary for the State to prove it beyond a reasonable doubt. *Benson v. State*, 661 S.W.2d 708 (Tex.Cr.App.1982 and 1983), *cert. denied*, 467 U.S. 1219, 104 S.Ct. 2667, 81 L.Ed.2d 372 (1984); *Boozer v. State*, 717 S.W.2d 608 (Tex.Cr.App.1984). Thus, it is arguable that the jury could have found that Ladner struck the deceased and caused his death, but acquitted the appellants because the State failed to prove he did so "knowing his conduct to be unlawful." Section 39.021(a)(1), (2), supra. Consequently, the jury's verdict could have been predicated upon the failure of proof of an element of the offense that is not necessary to proving the offense of murder. In other words, the jury's verdict in the civil rights prosecution could have been based on the resolution of an issue in the appellants' favor that will not be applicable to the succeeding prosecution. Very simply, whether a defendant knew his conduct was unlawful is statutorily irrelevant in a murder prosecution.

There are additional matters that render the court of appeals' decision incorrect. The two paragraph indictment alleged that appellant Ladner was the Chief of Police of Hemphill. The first paragraph claimed that as the Chief of Police he intentionally subjected the deceased to bodily injury by hitting him on his "head and body with a slapstick and fists. . . . ," thereby causing the deceased to hit his head against a wall and door, resulting in the deceased's death. In addition, as noted previously, the indictment included the allegation that the appellant did these things "knowing his conduct was unlawful."

The second paragraph makes similar preliminary allegations. Thereafter, however, it alleges that appellant Ladner intentionally prevented the deceased from getting medical attention after the deceased was injured while in custody, resulting in the deceased's death. This paragraph also included the claim that the appellant did this knowing his conduct was unlawful.

The indictments against the other two appellants, Horton and Hyden, are identical except they are alleged to have been Sabine County Deputy Sheriffs.

The jury charge, on the other hand, is somewhat different than the indictments. The instructions are divided between Count One and Count Two (paragraphs 1 and 2 of the indictment). The jury charge initially states that a peace officer violates the civil rights of a prisoner if "he intentionally subjects a person in custody to bodily injury knowing his conduct was unlawful." It then defines "intentional," "custody," and "peace officer." Before it sets out the allegations of the indictment the charge submits the defensive instruction that a peace

officer is justified in using force against a prisoner to the extent reasonably necessary to "maintain the security of the penal institution. . . . " The charge to the jury includes this defensive submission:

> Now, if you find from the evidence, or have a reasonable doubt thereof, that Thomas Ladner, as a peace officer or guard employed at a municipal or county jail, used such force against Loyal Garner, Jr. while he was in custody when and to the degree the peace officer, Thomas Ladner, reasonably believed that force was necessary to maintain the security of the penal institution, the safety or security of other persons in custody or employed by the penal institution, or his own safety or security, you will say not guilty by your verdict.

Thus, as to Count One the jury was authorized to find appellant Ladner not guilty without ever having to determine whether he struck the deceased or caused his death as alleged in the indictment. It is only after this instruction that the jury was asked to determine whether Ladner even struck the deceased as alleged in the indictment. Therefore, the jury could have reached its general verdict of not guilty without ever having to resolve the issue of whether Ladner struck the deceased with a slapstick or his fists. Consequently, it is impossible to conclude that this issue was resolved favorably to Ladner.

The charge, also as to Count One, authorized the jury to find appellants Horton and Hyden guilty only if they found Ladner guilty of striking the deceased as alleged in the indictment, and then only if the jury found they had a legal duty to prevent the offense and failed to do so. On the whole, the basis of the jury's general verdict of not

guilty as to Horton and Hyden is equally indeterminable as the verdict in favor of Ladner because the jury could not find them guilty as a party unless it found Ladner guilty as the principal.

Count Two, in three separate paragraphs, presented to the jury the claim that the appellants willfully denied the deceased reasonable and necessary medical attention, knowing their conduct was unlawful, resulting in the death of the deceased. The parties' charge was not applicable to this portion of the charge.

As previously noted, the appellants are charged separately in Smith County with murder. The identical indictments in two paragraphs allege that they individually intentionally and knowingly caused the death of the deceased "by striking him about the head with a slapjack, and striking him about the head with a night stick, and by striking him about the head with an object to the Grand Jury unknown. . . . " The second paragraph claims that the appellants individually "intending to cause serious bodily injury . . . [to the deceased] intentionally and knowingly commit, an act clearly dangerous to human life, to-wit: by striking . . . [the deceased] about the head with a slapjack, and by striking . . . [the deceased] about the head with a nightstick, and by striking . . . [the deceased] about the head with an object to the Grand Jury unknown, and thereby causing the death of . . . [the deceased]."

Contrasting the allegations in the murder indictments with the indictments and jury charge in the civil rights prosecution it is apparent that the issues are far from identical. As noted, under the jury charge the jury

could have acquitted Ladner without ever having to consider whether he struck the deceased with a slapstick. Under either paragraph of the murder indictment in order to obtain a conviction the State must properly prove Ladner struck the deceased as alleged with the intent to kill him. Relative to Hyden and Horton, their legal responsibility will be dependent upon the proof supporting the indictment's allegations and not necessarily what may or may not be proved against Ladner.

The allegations in the murder indictment have no relationship to the issues that comprise the second count of the civil rights violations indictment.

Whether an acquittal of a civil rights prosecution bars a prosecution for the substantive offense that produced the civil rights prosecution is a matter of first impression in Texas. In fact, there is very little case law on the subject at all. The federal courts, however, have examined the issue in a few cases. *United States v. Guillette*, 547 F.2d 743 (2nd Cir.1976), *cert. denied*, 434 U.S. 839, 98 S.Ct. 132, 54 L.Ed.2d 102 (1977), is a factually complex and legally involved case that confronts the opposite of the present issue, but its reasoning is nonetheless persuasive. The defendants in *Guillette* (Guillette and Joost) were convicted of conspiracy to deprive a citizen of his civil rights in violation of 18 U.S.C. § 241. Their prosecution arose out of an incident in which the government alleged they killed a prospective government witness who was going to testify against them in the burglary of a National Guard Armory. The defendants were originally indicted for conspiracy to deprive the deceased of his civil rights, obstruction of justice by force and violence, and the use of an explosive device in the

commission of a felony. The deceased was killed when a bomb exploded as he opened the front door of his house.

The defendants were originally convicted on all charges; however, those convictions were reversed and remanded. At the second trial, Joost was acquitted on the charges of obstruction of justice by force and violence and the use of an explosive device. The jury could not reach a verdict on the conspiracy to violate the deceased's civil rights. Thus, a mistrial was declared on that charge.

In his third trial, Joost was convicted of the civil rights charge.

In his appeal, Joost claimed that collateral estoppel barred the government from trying him for conspiracy to violate the deceased's civil rights because the jury had acquitted him of the obstruction of justice and using a bomb to commit a felony charges. [sic]. The court of appeals rejected Joost's contentions. The court stated:

> Double jeopardy bars only relitigation of those issues of fact that were 'necessarily . . . determined in favor of the defendant by a valid and final judgment in a prior proceeding.' [Citations omitted] Joost has failed to sustain his burden of showing that elements essential to his conviction of conspiracy with death resulting were foreclosed from jury consideration by his prior acquittal.

Id. at 755.

In the present case, the appellants have similarly failed to prove that the elements essential to their possible conviction for murder "were foreclosed from jury consideration by . . . [their] prior acquittal[s]." *Id.*

In *United States v. Kalish*, 780 F.2d 506 (5th Cir.1986), *reh. denied*, 689 F.2d 190 (1982), *cert. denied*, 459 U.S. 1108, 103 S.Ct. 735, 74 L.Ed.2d 958 (1983), the court of appeals confronted the issue of collateral estoppel and emphasized that before the doctrine can be invoked the matters to be relitigated must have dictated the previous acquittal. Factually, in *Kalish* the defendant was first tried as a result of the seizure of a shrimp boat loaded with marijuana. The defendant was acquitted of conspiracy to import the drug and conspiracy to possess with the intent to deliver the drug.

About the same time the shrimp boat was seized, the authorities also seized another boat also loaded with marijuana – an oil platform supply boat. After the defendant was acquitted for the offenses arising from the seizure of the shrimp boat he was prosecuted for the same charges relative to the drugs discovered on the other boat. In addition, he was charged with the substantive offense of possession with the intent to deliver. He was found guilty this time of all charges.

On appeal, the court of appeals reversed his conviction on the conspiracy charges because of his acquittal in the charges arising from the seizure of the shrimp boat. His conviction for possession, however, was affirmed.

Sometime later, the defendant was charged with a number of offenses relative to a large smuggling operation in East Texas. As a part of the indictment the defendant was charged with possession with intent to distribute and with aiding and abetting such possession.

In another count the defendant was charged with importation of marijuana and aiding and abetting such importation. He was convicted of these offenses.

In a post-conviction writ of habeas corpus the defendant claimed that his first conviction for the substantive offense of possession (arising from the seizure of the oil platform supply boat) was barred by collateral estoppel. Essentially, according to the court, the defendant claimed that in his first two prosecutions the government's principal witness was the same person. Therefore, according to the defendant, since the jury resolved the government's witness' testimony in his favor the government was estopped from using this same evidence to support the charge of possession of marijuana. The court of appeals disagreed and emphasized the necessity that the issues to be relitigated were resolved against the government in the first case. The court stated:

> In criminal cases, the government is barred from relitigating a fact issue 'only if the jury could not rationally have based its verdict on an issue other than the one the defendant seeks to foreclose . . . when a "fact is not *necessarily* determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue." ' *United States v. Lee*, 622 F.2d 787, 790 (5th Cir.1980) . . . [Emphasis in original]

Id. at 508.

The defendant in *Kalish* also claimed that his conviction on the charges arising from the East Texas smuggling operation was also barred by collateral estoppel. He claimed that his acquittal of the first conspiracy charge

precluded the government from relitigating those allegations. In dealing with this contention the court of appeals added another requirement to the application of collateral estoppel that is particularly relevant to the case at bar. The court stated the general rule that, as we have already observed, collateral estoppel prevents a later prosecution "if the jury could not rationally have based its verdict on an issue other than the one the defendant seeks to foreclose." *Id.* The court then added:

> 'When a "fact is not *necessarily* determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue." *Id,* quoting *Adams v. United States,* 287 F.2d 701, 705 (5th Cir.1961) [emphasis in original].'

Id.

It is the defendant's burden to prove both that the issues are identical and that in reaching their verdict of not guilty in the first trial the jury had to resolve the contested fact in favor of the defendant.

In *Kalish,* the defendant did not properly carry his burden of proving that an issue crucial to the defendant's conviction had been earlier resolved in his favor.

The appellants in the case at bar have also failed to properly carry their burden. In any case in which collateral estoppel is urged, the most difficult issue to resolve is the identity of issues and ultimate facts. It is particularly difficult when, as in this case, there is only a general verdict of not guilty. Further, in the present case our task is made even more difficult because there is no record of appellants' first trial. Therefore, it is virtually

impossible for us to state with any degree of reliability the basis of the jury's acquittal. It is, therefore, equally impossible to make any conclusive determination as to what issues were resolved in favor of the appellants, or accordingly, which facts that comprised the issues were decided adversely to the State. There is ample authority to support a denial of the appellants' writs of habeas corpus on this basis alone. See 9 *ALR3d* 2035, "Modern Status of Doctrine of Res Judicata in Criminal Cases" (1966).

However, engaging in the speculation attendant to the discussion of the relevant features of the jury charge in the civil rights prosecution and the respective indictments in the murder prosecutions it is clear that the ultimate issues in the two cases are not identical. Thus, collateral estoppel is not applicable.

As a passing observation, it should be noted that when the Legislature enacted § 39.021(c), supra, and stated that "[t]his section shall not preclude prosecution for any other offense set out in this code" it obviously intended that one could be prosecuted for a civil rights offense and any other applicable violation of the law. Obviously, legislative intent, no matter how well intentioned, must yield to a defendant's constitutional rights if they conflict. When, however, the Legislature's intent can be effectuated without a deprivation of a defendant's constitutional rights it is this Court's duty to do so. See *Spradling v. State*, 773 S.W.2d 553 (Tex.Cr.App.1989).

Accordingly, the judgment of the court of appeals is reversed and the cause is remanded to the trial court.

CLINTON, J., concurs in the result.

MILLER, J., concurs with note: "I concur in the result reached in disposing of appellant's 'preliminary claim' (page 249). I would prefer a 'same offense' analysis more along the lines of *January v. State,* 695 S.W.2d 215 (Tex.App. – Corpus Christi 1985), approved by this Court in *January v. State,* 732 S.W.2d 632 (Tex.Cr.App.1987). I join the rest of the majority opinion."

TEAGUE, J., dissents.